85-1648

No. _____

In The

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

October Term, 1985

CALIFORNIA HOSPITAL ASSOCIATION, a non-profit California corporation; CALIFORNIA RESTAURANT ASSOCIATION, a non-profit California corporation; CALIFORNIA MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA HOTEL AND MOTEL ASSOCIATION, a non-profit California corporation,

Petitioners,

v.

PATRICK W. HENNING, as Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California,

Respondent.

On Writ Of Certiorari
To The United States Court Of
Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a vacation benefit plan or program sponsored and maintained by an employer engaged in interstate commerce and financed through the employer's general assets constitutes an "employee benefit plan" subject to the Employee Retirement Income Security Act of 1974;

Whether California laws that require the payment of prorated vacation benefits to an employee upon termination of employment, notwithstanding the employee's ineligibility for such benefits under the terms of the employer's vacation benefit plan or program, are preempted by the Employee Retirement Income Security Act of 1974.

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Petitioners,

v.

PATRICK W. HENNING, as Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the

Ninth Circuit entered in these proceedings on September 6, 1985, as amended by order of the Court of Appeals on February 26, 1986.

OPINIONS BELOW

The order of the Court of Appeals denying Petitioners' petition for rehearing and suggestion for rehearing en banc and amending its opinion is reproduced as Appendix A to this Petition. The opinion and judgment of the Court of Appeals over which review is sought is published at 770 F.2d 856, and is reproduced as Appendix B to this Petition.

The opinion of the United States District Court for the Central District of California granting Petitioners' motion for summary judgment is published at 569 F.Supp. 1544, and is reproduced as Appendix C to this Petition. The judgment and findings of fact and conclusions of law of the District Court are reproduced as Appendix D to this Petition. The

opinion of the District Court granting Petitioners' motion for preliminary injunction is published unofficially at 96 Lab. Cas. (CCH) ¶ 55,384, and is reproduced as Appendix E to this Petition.

JURISDICTION

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on September 6, 1985. Petitioners' timely petition for rehearing and suggestion for rehearing en banc was filed on September 20, 1985, and was denied by the Court of Appeals on February 26, 1986. This Petition is timely filed within 90 days of the Court of Appeals' February 26 order.

CONSTITUTIONAL, STATUTORY AND OTHER AUTHORITY INVOLVED

Constitution Of The United States

The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

Federal Law And Authority

Section 3(1) of the Employee Retirement Income Security Act of 1974 ("ERISA") provides:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or

> otherwise, (A) medical, surgical, or hospital care or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions or retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1) (emphasis added).

Section 3(3) of ERISA provides:

> The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

29 U.S.C. § 1002(3).

Section 4(a) of ERISA provides:

> Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained--
>
> (1) by any employer engaged in commerce or in any industry or activity affecting commerce; or
>
> (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or
>
> (3) by both.

29 U.S.C. § 1003(a).

Section 514(a) of ERISA provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

29 U.S.C. § 1144(a).

Section 514(c) of ERISA provides:

> For purposes of this section:
>
> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.
>
> (2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

29 U.S.C. § 1144(c).

The United States Department of Labor ("DOL") has promulgated regulations that purport to construe ERISA's definition of an

"employee welfare benefit plan" in such a way so as to exclude unfunded vacation benefit plans and programs from ERISA's coverage. These regulations provide:

> Payroll practices: For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include--
>
> (1) Payment by an employer of compensation on account of work performed by an employee, including compensation at a rate in excess of the normal rate of compensation on account of performance of duties under other than ordinary circumstances, such as--
>
> (i) Overtime pay,
>
> (ii) Shift premiums,
>
> (iii) Holiday premiums,
>
> (iv) Weekend premiums;
>
> (2) Payment of an employee's normal compensation, out of the employer's general assets, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties, or is otherwise absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment); and
>
> (3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example--

> (i) Payment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons.

29 C.F.R. § 2510.3-1(b).

State Law And Authority

Section 227.3 of the California Labor Code provides:

> Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination. The Labor Commissioner or a designated representative, in the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness.

In Suastez v. Plastic Dress-Up Co., which is reported at 31 Cal.3d 774, 183 Cal.Rptr. 846, 647 P.2d 122, the California Supreme

Court construed Labor Code Section 227.3 to require payment of prorated vacation benefits upon termination of employment even where language in the governing vacation benefit plan or program prohibits the payment of prorated benefits to employees who fail to satisfy specified eligibility conditions. The Suastez decision required the employer in that case to pay prorated vacation benefits to an employee who was not employed on his anniversary date and who therefore had not met the eligibility requirements of his employer's vacation plan. The Suastez decision is reproduced as Appendix F to this Petition.

Following the Suastez decision, Respondent California Labor Commissioner issued Policy and Procedure Memo 82-4 to articulate his official enforcement policy with respect to the obligations of California employers to pay prorated vacation benefits. Respondent's Policy and Procedure Memo 82-4 is reproduced as Appendix G to this Petition.

STATEMENT OF THE CASE

This case presents issues of critical importance to the hundreds of thousands of employers throughout the United States who maintain the vacation benefit plans and programs that cover over 20 million employees.[1/] The principal question raised in this case is whether unfunded vacation benefit plans and programs are subject to exclusive federal regulation as "employee benefit plans" under ERISA. In addition, this case presents the question as to whether the states may lawfully regulate vacation benefits under the

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1/ The United States Department of Labor found that substantially all of the 20,000,000 employees of medium and large employers covered by a 1984 survey participate in vacation benefit plans or programs sponsored by their employers. News Release 84-194, Employee Benefits in Medium and Large Firms, U.S. Dept. of Labor, Bureau of Statistics, May 1, 1984. These statistics, while impressive, obviously fail to take into account all employers in the country that sponsor vacation benefits for their employees.

guise of wage regulation. Given the widespread use of unfunded vacation benefit plans and programs throughout the country, and given the conflicting decisions of federal and state appellate courts regarding ERISA's applicability to such plans and programs, the fundamental issues of ERISA coverage and preemption presented by this case are of obvious national importance and should properly be resolved by this Court.[2/]

2/ This Court has already been asked to review the scope of ERISA's coverage of employer severance pay plans and programs and to determine whether the states may lawfully regulate severance benefits under the guise of wage regulation. Gilbert v. Burlington Industries, Inc., 765 F.2d 320 (2nd Cir. 1985), separate appeals filed, Doc. Nos. 85-441 and 85-460, 54 U.S.L.W. 3179 (1985), and Holland v. Burlington Industries, Inc., 772 F.2d 1140 (4th Cir. 1985), appeal and pet. cert. filed, Doc. Nos. 85-929 and 85-944, 54 U.S.L.W. 3412 (1985). Significantly, this case and the Gilbert and Holland cases involve the same provisions of ERISA and regulations of the United States Department of Labor regarding the extent of ERISA's coverage. By accepting each of these three cases for review, this Court can take advantage of an

This Petition arises out of the following set of facts. On July 1, 1982, the California Supreme Court decided the case of Suastez v. Plastic Dress-Up Co., 31 Cal.3d 774, 183 Cal.Rptr. 846, 647 P.2d 122 (1982). (App. F.) The California court concluded that California employees who have not earned and are not eligible to receive any vacation benefits according to the explicit conditions of their employers' vacation plans or programs are nevertheless entitled to receive prorated vacation benefits upon termination of employment. The California court also determined that an employee's right to prorated vacation benefits is protected against forfeiture by California Labor Code Section 227.3, regardless of any contrary language in the employ-

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2/ (Continued)

unique opportunity to resolve the critical issues raised by these cases concerning the scope of ERISA's coverage of welfare benefit plans.

er's vacation plan or program.[3/]

On September 30, 1982, Respondent issued Policy and Procedure Memo 82-4 ("Enforcement Policy") to articulate the official enforcement policy of the California Division of Labor Standards Enforcement ("DLSE") with respect to the obligations of California employers to provide vacation benefits in a manner consistent with the Suastez decision.[4/] (App. G.) The Enforcement Policy purports to regulate the eligibility and other substantive provisions of vacation benefit plans and programs. The Enforcement Policy also dictates the timing and circumstances under

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3/ Since California employers, like other employers throughout the nation, are not required by state or federal law to provide their employees any vacation benefits, the Suastez decision penalized only those employers who had generously decided to offer such benefits.

4/ Respondent is "Chief" of the DLSE. Cal. Lab. Code § 21. The DLSE is the state agency charged with responsibility for enforcing all of California's wage and hour laws. Cal. Lab. Code §§ 79-105.

which vacation benefits must be paid under such plans and programs.

Not surprisingly, the Suastez decision and the Enforcement Policy were of tremendous significance to the thousands of California employers who voluntarily provide vacation benefits as a fringe benefit to their employees. Like other employee benefit plans, such as retirement, profit sharing, medical, disability, and severance pay plans, the adoption of a vacation benefit plan or program is not mandated by law, but rather completely subject to the economic discretion of employers. Nevertheless, hundreds of thousands of employers throughout the United States have decided to sponsor such benefits to enhance their ability to attract and retain qualified workers, as well as to promote the well-being and morale of their employees. Employers have found that vacation benefits not only provide employees a period for rest and relaxation away from work, but also protect employees against the physical and mental fatigue that

can result in accidents or illness, or otherwise diminish employee productivity.

Recognizing the many advantages of employee benefit plans, and relying on their freedom to structure such plans in a manner best suited to their own business needs, Petitioners and their members, like hundreds of thousands of other employers throughout the country, have carefully designed packages of employee benefits for their employees. These employee benefit packages often include such components as retirement, profit sharing, medical, death, disability, severance pay, and vacation benefits. Significantly, in designing these benefit plans, Petitioners and their members have considered a number of factors, including the overall cost and affordability of the benefits. Moreover, many members of Petitioners with multi-state operations have designed uniform employee benefit packages for their employees in each of the states in which they conduct business.

In December of 1982, Petitioners filed a complaint for declaratory and permanent injunctive relief, and a motion for a preliminary injunction, with the United States District Court for the Central District of California. The purpose of this suit was to invalidate and enjoin the enforcement of Section 227.3, Suastez, and the Enforcement Policy on the theory that each of these state laws is preempted by ERISA and, therefore, invalid and unenforceable.

After fully considering the parties' cross-motions for summary judgment, the District Court entered judgment in favor of Petitioners on September 8, 1983.[5/] (569 F.Supp. 1544; App. C). Based on the plain meaning of the statute, the District Court

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5/ The District Court had previously granted Petitioners' motion for a preliminary injunction on February 25, 1983. (App. E.) The District Court exercised jurisdiction over this case pursuant to 28 U.S.C. §§ 1331(a) and 1337, and 29 U.S.C. § 1132(e).

held that any plan, fund, or program maintained to provide vacation benefits by an employer engaged in interstate commerce is an "employee welfare benefit plan" subject to ERISA coverage, irrespective of whether such arrangement is funded, trusteed, or embodied in a writing. (569 F.Supp. at 1546; App. C at C8.) Relying on this Court's decision in Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 77 L.Ed. 490, 103 S.Ct. 2890 (1983), the District Court further held that ERISA prohibits all state regulation relating to welfare benefit plans, including unfunded vacation benefit plans. (569 F.Supp. at 1546; App. C at C9.) Finally, the District Court held that the Enforcement Policy, Suastez, and Section 227.3 are each "State laws" within the meaning of Section 514(c) of ERISA, 29 U.S.C. § 1144(c), and that these state laws "relate to" employee welfare benefit plans within the meaning of Section 514 of ERISA, 29 U.S.C. § 1144, as construed by this Court in Shaw. (569 F.Supp. at 1547; App. C at C11.) The District Court

therefore concluded that the Enforcement Policy, Suastez, and Section 227.3 were preempted and invalid. (569 F.Supp. at 1547; App. C at C12.)

On appeal, the Ninth Circuit Court of Appeals reversed the District Court. The Ninth Circuit predicated its decision on a United States Department of Labor ("DOL") regulation that excludes from the definition of "employee welfare benefit plan" various "payroll practices," including the "[p]ayment of compensation out of the employer's general assets . . . while an employee is on vacation." 29 C.F.R. § 2510.3-1(b)(3). (770 F.2d at 858, App. B at B4.) In finding this regulation to be dispositive of the case, the Ninth Circuit concluded that ERISA's coverage of vacation benefit plans or programs depends solely on whether the vacation benefits under those plans or programs are financed through a trust fund or through the employer's general assets. (770 F.2d at 859-861, App. B at B6-B13.) According to the reasoning of the

Ninth Circuit, an employer that finances vacation benefits through a trust fund is free from state regulation but must comply with ERISA. (770 F.2d at 861; App. B at B13-B14.) In contrast, an employer that finances vacation benefits from its general assets under an identical vacation benefit plan or program is entirely free from ERISA regulation but must comply with any applicable state laws. (Id.)

As explained in detail below, the Ninth Circuit's decision conflicts with decisions of this Court, other federal courts of appeals, federal district courts, and a state court of last resort. Moreover, the Ninth Circuit's decision is simply nonsensical. It is illogical to conclude that Congress intended ERISA to govern vacation benefits only when those benefits are paid from a trust. Vacation benefit plans or programs, like other welfare benefit plans or programs, are completely exempt from ERISA's funding rules. 29 U.S.C. § 1081(a)(1). A vacation benefit trust fund can therefore literally be established

overnight and funded with one dollar without offending any ERISA requirement. Moreover, the Internal Revenue Service has ruled that an employer that has established such a trust can continue to pay vacation benefits from its general assets on behalf of the trust and later simply seek reimbursement from the trust. Rev. Proc. 70-6; Private Letter Ruling 8335087 (June 1, 1983). Obviously, Congress could not have intended the establishment of such a trust to be the sine qua non of ERISA's coverage of vacation benefits.

The lack of logic to the Ninth Circuit's trust fund distinction can easily be illustrated. Assume that an employer sponsors a single vacation benefit plan for two groups of employees. The employer pays vacation benefits under the plan to the first group of employees from a trust fund financed with whatever amount the employer chooses, in its complete discretion, to deposit in the fund to pay such benefits. The employer pays benefits under the same plan to the second group of

employees from its general assets. Under the Ninth Circuit's and the DOL's reasoning, only the first group of employees would be entitled to ERISA's protections since they would be participants in an employee benefit plan. The second group would be excluded from ERISA's protections because they would be participants in a mere "payroll practice." The employer would thus have to comply with state law with respect to half of its plan and federal law with respect to the remaining half of its plan. The legislative history and plain language of ERISA, as well as the numerous decisions discussed below, make it manifestly clear that ERISA's coverage of vacation benefit plans and programs does not hang on so tenuous a distinction as that espoused by the Ninth Circuit and the DOL.

A thoughtful analysis of the Ninth Circuit's decision further reveals that it offers absolutely no protection to employees while providing an enormous regulatory loophole for employers. According to the Ninth

Circuit, employers can pick and choose whether to subject their vacation plans or programs to state or federal regulation. If an employer operates in a state such as California with onerous vacation benefit laws, it can simply "ERISA-fy" its vacation benefits, and thereby evade state regulation on preemption grounds. The employer must simply funnel all vacation benefit payments from its general assets through an otherwise hollow vacation benefit trust fund. On the other hand, if the employer operates in a state with either no vacation benefit rules or rules it finds acceptable, it can finance its vacation benefits from its general assets and thereby evade all obligations under ERISA. Clearly, in extending ERISA's coverage to "any plan, fund, or program . . . established . . . for the purpose of providing . . . vacation benefits," 29 U.S.C. § 1002(1), Congress did not intend to establish a trust fund distinction that would permit employers to engage so easily in this type of regulatory dodgeball.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THIS COURT, OTHER FEDERAL CIRCUIT COURTS OF APPEALS, FEDERAL DISTRICT COURTS, AND A STATE COURT OF LAST RESORT

The Ninth Circuit's conclusion that ERISA's coverage of vacation benefits depends solely on whether those benefits are financed out of an employer's general assets or from a trust fund is entirely inconsistent with the decisions of numerous other appellate courts. For example, the Ninth Circuit's general asset distinction is refuted by this Court's decisions in Russell v. Massachusetts Life Insurance Co., __ U.S. __, 87 L.Ed.2d 96, 105 S.Ct. 3085 (1985), and Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 77 L.Ed.2d 490, 103 S.Ct. 2890 (1983), wherein this Court implicitly held that an "employee welfare benefit plan"

need not be financed through a trust or any separate fund in order to be covered under ERISA. In Russell, this Court ruled that a salary continuation plan that provides sick pay benefits from an employer's general assets while eligible employees are away from work due to illness or disability is an employee benefit plan subject to ERISA. The Russell decision flatly contradicts the reasoning of both the Ninth Circuit's decision and the DOL regulation upon which the Ninth Circuit relied.[6/] Similarly, in Shaw, this Court

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6/ 29 C.F.R. § 2510(b), the same DOL regulation relied upon by the Ninth Circuit in this case, provides that payments of compensation from an employer's general assets due to disability, illness or vacation involve mere "payroll practices" and not employee benefit plans subject to ERISA. It is thus in conflict with this Court's implicit findings in Russell and Shaw that general asset disability and illness plans are covered under ERISA.

ruled that a salary continuation/disability program funded out of an employer's general assets was covered by ERISA, and thus impliedly held that a welfare benefit plan need not be financed from a trust fund in order to be covered under ERISA. Implicit in this Court's reasoning is that ERISA coverage turns on the type of benefit provided rather than on the source of payment of that benefit.[7/]

The Ninth Circuit's decision is in direct conflict with the Sixth Circuit Court of Appeals' decision in Blakeman v. Mead Containers, 779 F.2d 1146 (6th Cir. 1985). In

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7/ Obviously, if Congress had desired vacation benefits to be funded from a trust, it would have established the same sort of funding obligation that it did with pension plans. Significantly, although ERISA requires pension benefits to be financed through a trust fund, such benefits are subject to ERISA whether or not this requirement is met. Failure to meet ERISA's funding rules constitutes a compliance problem, not an ERISA coverage issue. Here, the Ninth Circuit has illogically made the manner in which vacation benefits are financed to be the determining factor for ERISA coverage.

Blakeman, the Sixth Circuit considered the state law claims of individuals who alleged that they were owed vacation benefits under an unfunded vacation benefit plan sponsored by their former employer. In ruling that the plaintiffs' state law claims were preempted by ERISA, the Sixth Circuit expressly held that the employer's unfunded vacation benefit plan constituted an "employee welfare benefit plan" as defined in 29 U.S.C. § 1002(1), and specifically rejected the Ninth Circuit's contrary holding in the instant case.[8/]

The Ninth Circuit's decision also conflicts with decisions of the Second and Fourth Circuit Courts of Appeals. Gilbert v.

8/ Immediately after stating its conclusion that the employer's unfunded vacation benefit plan was subject to ERISA, the Sixth Circuit cites the Ninth Circuit's decision in a footnote with a "But see" signal. (779 F.2d at 1149.) The Uniform System of Citation, 13th Ed. (Harvard Law Review Association et al., 1981) defines the signal "But see" at page 9 as follows: "Cited authority directly contradicts the proposition" (emphasis added).

Burlington Industries, Inc., 765 F.2d 320 (2nd Cir. 1985), supra, and Holland v. Burlington Industries, Inc., supra. In Gilbert and Holland, the Second and Fourth Circuits expressly held that employee welfare benefit plans need not be trust-funded in order to be covered by ERISA.[9/] Significantly, in reaching this conclusion, the Gilbert and Holland courts held that laws of the states of New York and North Carolina were preempted by ERISA to the extent that those laws related to employer severance payments, including "vacation severance" payments.

In Gilbert, the Second Circuit held that an unfunded severance or "vacation severance" policy was an "employee welfare benefit plan"

9/ In Gilbert, the Second Circuit confirmed the district court's earlier conclusion that "an ERISA plan [does] not need to have assets separate from the general assets of the employer." In Holland, the Fourth Circuit also "reject[ed] the . . . contention that Burlington's severance pay plan is not within ERISA because it is not specially funded." (772 F.2d at 1145.)

under 29 U.S.C. § 1002(1)(B). In so holding, the Second Circuit concluded that Congress' use of the phrase "described in" in Section 1002(1)(B) is intended to bring within ERISA "all types of benefits that are enumerated in 29 U.S.C. § 186(c), even those benefits not permitted under the section because they are not funded through a trust." (765 F.2d at 326, emphasis added by the court.) Similarly, the Fourth Circuit in Holland stated that "the reference in Section 1002(1)(B) is to types of benefits that are to be covered by ERISA, whether in the form of trust funds or not." (772 F.2d at 1146.) It is noteworthy that 29 U.S.C. § 186(c) refers directly to "pooled vacation, holiday, severance or similar benefits." It is thus evident that the same analysis of the legislative history that the Second and Fourth Circuits found indicative of a congressional intent to extend ERISA coverage to all benefits "described in" 29 U.S.C. § 186(c)(6) applies with equal force to unfunded vacation, holiday, severance, or

similar benefits. Nothing in ERISA or its legislative history justifies one reading of the quoted language when dealing with holiday, severance, and similar benefits, and an entirely conflicting reading when addressing vacation benefits. Nor is there any logical basis to conclude that unfunded holiday and severance pay plans are covered by ERISA while unfunded vacation plans and programs are not.

The Gilbert and Holland decisions are of particular significance to this case. First, this Court's review is currently being sought in all three cases. See footnote 2, supra. Second, the Gilbert and Holland cases, like the instant case, call into question the DOL's regulations defining the scope of ERISA's coverage of employee welfare benefit plans. In Gilbert and Holland, the Second and Fourth Circuits upheld a DOL regulation that provides that employer holiday or severance pay plans or programs need not be financed through a trust fund in order to be covered under

ERISA.[10] See 29 C.F.R. 2510.3-1(a)(3). Quite simply, the DOL has concluded that unfunded holiday or severance pay plans or programs are subject to ERISA coverage while unfunded vacation benefit plans or programs are not, despite the fact that there is absolutely nothing in ERISA or its legislative history to support this distinction.[11] This

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10/ Interestingly enough, some of the same states that are vehemently attacking the logic of the DOL's regulation with respect to ERISA's coverage of severance pay arrangements in the Holland and Gilbert cases have advocated "deference" to the DOL's expertise on ERISA coverage in this case.

11/ One justification that has been suggested for the DOL's contradictory treatment of severance benefit and vacation benefit plans or programs is that, in enacting ERISA, Congress specifically intended to protect employees against defaults in benefit payments by their employers. See Scott v. Gulf Oil Corp., 754 F.2d 1499 (9th Cir. 1985). Since severance benefits are paid upon termination of employment, and since an employer who lays off many employees at once may find itself faced with a large lump sum severance pay obligation, it is arguably necessary to extend ERISA's safeguards to all severance benefit plans or programs, regardless of the manner in which the benefits are financed. However, when one focuses

Court thus has the unique opportunity to grant review in this case and the Gilbert and Holland cases in order to resolve, in a com-

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11/ (Continued)

on the fact that the state laws at issue in this case mandate the same sort of lump sum benefit payments upon termination of employment that were involved in the Gilbert and Holland cases, it becomes clear that the "fear-of-default" basis for distinguishing between the need for ERISA coverage of unfunded severance benefits as opposed to unfunded vacation benefits falls apart.

Here, California's proration-upon-termination requirement with respect to vacation benefits creates a greater potential for default in connection with large employee layoffs and plant sales or closings than exists with respect to severance benefits. Indeed, many more employees participate in vacation benefit programs than in severance pay programs. Consequently, it is highly probable that an employer confronted with a prospective layoff, plant sale or plant closing would have substantially greater costs (and thus potential for default) for its vacation benefit obligation than for its severance benefit obligations. Moreover, the purported distinction between severance and vacation benefits in Scott ignores the fact that the same DOL regulation that recognizes ERISA's coverage of severance pay, 29 C.F.R. § 2510.3-1(a)(3), also recognizes coverage of holiday pay benefits, which clearly present no fear-of-default issue.

prehensive fashion, the critical issues raised by these three cases concerning the scope of ERISA's coverage of welfare benefit plans.

The Ninth Circuit's decision also conflicts with the Eleventh Circuit's decision in Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982). The Dillingham decision permits an employee welfare benefit plan to utilize any "source of financing" and explicitly rejects the contention that a trust or other single source of financing benefits is required for ERISA coverage. (688 F.2d at 1372-1373.)

The Ninth Circuit's decision is in direct conflict with the federal district court decisions in James v. T.G.&Y. Stores Co., No. 85-0113 (W.D. La. 1985),[12/] and Holland v. National Steel Corp., C.A. No. 83-0033-W(M) (N.D. W.Va. 1985).[13/] In the James case, the

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12/ The James decision is reproduced as Appendix H to this Petition.

13/ The National Steel decision is reproduced as Appendix I to this Petition.

plaintiffs sued their former employer under state law to recover vacation benefits purportedly promised them just prior to their termination. The district court held that the employer's unfunded vacation benefit program was covered by ERISA and that the plaintiffs' state law claims were thus preempted. (App. H at H7-H8.)

Similarly, in the National Steel decision, the plaintiff initiated an action for breach of contract and for a violation of the West Virginia wage payment statute because of her employer's failure to provide her regular and extended vacation benefits upon her layoff. As in the James case, the court found that both the regular and extended vacation benefits available under the employer's unfunded vacation benefit plan were subject to ERISA, which preempted the state statutory and contract claims. (App. I at I5-I6.)

The Ninth Circuit's decision also conflicts with the federal district court's decision in Northwest Airlines, Inc. v.

Gomez-Bethke, unofficially reported at 34 Fair Emp. Prac. (BNA) Cases 837 (D. Minn. 1984). In Gomez-Bethke, an employer argued that a Minnesota law was preempted by ERISA to the extent that it related to its vacation and sick leave plans. Both plans provided "continuation of an employee's full salary" during a vacation or sick leave. Moreover, the plans permitted employees to "utilize their vacation and sick leave entitlements to obtain full pay during their absence. . . ." (34 Fair Emp. Prac. (BNA) Cases at 839.) Neither plan provided for distribution of these benefits from a trust but involved normal salary continuation arrangements. Thus, the plans were squarely covered by the DOL regulation set forth in 29 C.F.R. § 2510.3-1(b), although the regulation was not addressed by the court. Based on its reading of the plain language of 29 U.S.C. § 1002(1), the court found no difficulty concluding that (1) the employer's vacation policy was a welfare plan and (2) the state's regulation of that policy was

preempted. (34 Fair Emp. Prac. (BNA) Cases at 842-843.)

Finally, the Ninth Circuit's decision is in direct conflict with the decision of the Supreme Judicial Court of Massachusetts in Barry v. Dymo Graphic Systems, Inc., 394 Mass. 830 (1985).[14/] In that case, the Massachusetts' appellate court of last resort specifically held that vacation benefit programs funded from an employer's general assets are covered by ERISA, and that any state laws that relate to such programs are preempted. (App. J at J15-J19.) In so holding, the court specifically agreed with the District Court's decision in this case that the DOL regulation was inconsistent with the plain language of 29 U.S.C. § 1002(1).

In sum, the Ninth Circuit's conclusion that a vacation benefit plan or program must be financed from a trust fund in order to be covered under ERISA is in direct conflict with

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14/ The Barry decision is reproduced as Appendix J to this Petition.

the decisions of the Sixth Circuit in Blakeman v. Mead Containers, supra, the Supreme Judicial Court of Massachusetts in Barry v. Dymo Graphic Systems, Inc., supra, and the United States District Courts for the Western District of Louisiana in James v. T.G.&Y. Stores Co., supra, and the Northern District of West Virginia in Holland v. National Steel Corp., supra. In addition, the Ninth Circuit's decision is implicitly contradicted by the decisions of this Court and other federal courts cited above that find the manner in which an employee welfare benefit plan is financed entirely irrelevant to the determination of ERISA coverage. Under these circumstances, and given the pendency of the requests for review by this Court in the Gilbert and Holland cases, special and important reasons within the meaning of Rule 17.1 of this Court clearly exist to warrant this Court's exercising its discretion to resolve the critical issues of ERISA coverage and preemption raised by this case.

II.

THIS CASE PRESENTS FUNDAMENTAL ISSUES OF NATIONAL IMPORTANCE, AFFECTING EVERY VACATION BENEFIT PLAN AND PROGRAM IN THE COUNTRY, REGARDING THE SCOPE OF ERISA'S COVERAGE AND PREEMPTIVE SWEEP

The national importance of this case is patently clear. Hundreds of thousands of employers throughout the nation maintain unfunded vacation benefit plans and programs for millions of employees. The basic issue presented by this case is whether federal law preempts the states' rights to regulate such plans and programs. The national importance of this issue is confirmed by the fact that it has recently arisen not only in this California case, but in cases in Illinois, National Metalcrafters v. McNeil, ___ F.2d ___, No. 85-1263 (7th Cir. 1986), Kentucky, Blakeman v. Mead Containers, supra (App. H), Louisiana, James v. T.G. & Y. Stores Co., supra (App. H), Massachusetts, Barry v. Dymo

Graphic Systems, Inc., supra (App. J), and West Virginia, Holland v. National Steel Corp., supra, (App. I), and is likely to continue to arise until finally decided by this Court.[15/] Thus, this is precisely the type of case over which this Court should exercise its discretionary powers of review.[16/]

15/ Significantly, in four of the five cases cited above, the courts reached the opposite conclusion from the Ninth Circuit in this case. In the only other cited case, the National Metalcrafters decision, the court expressly refused to decide what it characterized as the "difficult" vacation benefit issue.

16/ The intense national interest in the scope of ERISA's coverage of employee welfare benefits (such as severance and vacation benefits), and the widespread concern over the legality of state regulation of such benefits, is confirmed by the number of amici curiae participants in this case and the Gilbert and Holland cases. These amici curiae participants include the United States Department of Labor, the AFL-CIO, and the states of Alaska, California, Connecticut, Hawaii, Illinois, Maryland, Montana, New York, North Carolina, Oklahoma, and Vermont, as well as the District of Columbia.

As this Court has previously recognized, one of Congress' principal objectives in enacting ERISA was to occupy the entire employee benefit field and to preclude the states from regulating such benefits. Shaw v. Delta Air Lines, Inc., supra. To achieve this objective, Congress extended coverage to a broad class of employee welfare benefit plans in addition to pension plans. A review of ERISA's legislative history reveals that Congress had little, if any, information regarding abuses with respect to many of the various welfare benefit plans it included in ERISA, such as hospitalization, medical, accident, sickness, death, severance, prepaid legal services, and vacation benefits. Congress was concerned, however, that a failure to bring all such benefit programs under the umbrella of ERISA coverage would expose them to a variety of conflicting state laws. Congress feared that such conflicting state regulation was likely to cause employers, such as multi-state companies, to reduce or

eliminate important benefits due to the costs and complications of compliance with a myriad of potentially conflicting state laws.[17/]

On the other hand, Congress was not concerned that ERISA coverage would result in an intolerable degree of federal regulation of welfare benefit plans. The requirements of coverage under Title I of ERISA for such plans can be handled quite simply.[18/] There are, in

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17/ ERISA's declaration of policy states that the "operational scope and economic impact of [employee benefit] plans is increasingly interstate," and that "the continued well-being and security of millions of employees . . . are directly affected by these plans," and "that they are affected with a national public interest." 29 U.S.C. § 1001(a).

18/ It is significant that the DOL's own statistics reveal that virtually all of the large and medium employers in the United States who sponsor vacation benefit programs also sponsor health and life insurance programs, which even the Ninth Circuit agrees are covered by ERISA regardless of the existence or absence of a trust fund. See Hewlett-Packard Co. v. Barnes, 425 F.Supp. 1294 (N.D. Cal. 1977), aff'd, 571 F.2d 502 (9th Cir. 1978), cert. denied, 439 U.S. 831 (1978). Consequently, contrary to the Ninth

fact, clear exemptions for welfare plans from all of ERISA's burdensome rules, such as its funding, participation, benefit accrual, bonding, and vesting requirements.[19/] Compliance with the remaining rules, such as the reporting and disclosure, fiduciary, and claims procedure rules, can be easily achieved. Moreover, Congress has empowered the DOL to exempt many welfare plans from ERISA's re-

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18/ (Continued)

Circuit's suggestion in this case, the large volume of vacation benefit plans and plan participants does not justify the exclusion of such plans from ERISA; it underscores Congress' interest in occupying the field and safeguarding all such programs from conflicting state laws and thus possible termination.

19/ See, e.g., 29 U.S.C. § 1051(1) (exemption from participation, benefit accrual, and vesting rules), § 1081(a)(1) (exemption from funding rules) and, § 1112(a)(1) (exemption from bonding rules for general asset plans).

porting and disclosure rules.[20/]

Compelling evidence that ERISA's rules for welfare plans are relatively simple and are already being satisfied is found in the fact that many of the same employers who have vacation plans also have one or more other welfare plans subject to ERISA. These employers have generally found it quite simple to comply with all of the rules applicable to welfare plans, such as plans that provide hospitalization, disability, death, accident, dental, medical, severance or sick benefits. It is certainly no more difficult for

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20/ The DOL has already exempted welfare plans with fewer than 100 plan participants from the reporting and disclosure requirements if "benefits are paid as needed solely from the general assets of the employer." 29 C.F.R. § 2520.104-20(b)(2)(i) (emphasis added). This exemption is available to small employers. Significantly, the DOL was authorized to exempt plans only from ERISA's reporting and disclosure rules, not from ERISA itself or its preemptive sweep.

employers to comply with the same rules for their vacation plans.

Thus, the Ninth Circuit's decision simply attributes incredible short-sightedness to Congress' view of the employee benefit field when it enacted ERISA. In construing the terms "welfare plan" and "vacation benefits" in a narrow manner that conflicts with the plain meaning of the statute, the Ninth Circuit has lost sight of the "crowning achievement" of ERISA, i.e., its goal to occupy completely the employee benefit field and protect benefits from diverse state laws. Without any legislative history to support its view, the court simply assumes that Congress incorporated the term "vacation benefits" in Section 3(1) of ERISA, 29 U.S.C. § 1002(1), without limiting that term in any manner, yet intended to exclude from the term unfunded vacation benefits provided to the vast majority of the 20 million employees covered by vacation plans and programs in this country.

Not surprisingly, the states have hastened to assert regulatory authority over employee benefit plans under the guise of "wage" regulation.[21/] This has resulted in duplicative litigation throughout the country

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21/ For example, both New York and California assert authority to regulate all forms of "wages" and define that term, either by statute or state court interpretation, to include pension, profit sharing, and retirement benefits. Article 6, Section 190 of the New York Labor Law defines "wages" to include "benefits or wage supplements," and delegates the New York Labor Commissioner authority to regulate such "wages." Section 198-C(2) provides that the term "benefits or wage supplements" includes "health, welfare and retirement benefits, vacation, separation or holiday pay." Thus, it clearly relates to a variety of benefits subject to ERISA. Pension and profit sharing benefits are also considered "wages" within the meaning of California Labor Code Section 200. See, e.g., Hunter v. Sparling, 87 Cal.App.2d 711, 197 P.2d 807 (1948), and Ware v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 24 Cal.App.3d 35, 100 Cal.Rptr. 791 (1972). The California and New York laws also previously attempted to regulate severance pay as "wages" until those laws were found preempted by ERISA. Gilbert v. Burlington Industries, Inc., supra, and California Chamber of Commerce v. Simpson, 601 F.Supp. 104 (C.D. Cal. 1985).

concerning ERISA's preemptive sweep over state laws purporting to regulate plans and programs that provide various welfare benefits, including severance benefits, vacation benefit, and medical benefits. By accepting this case and the Gilbert and Holland cases for review, this Court can definitively demarcate the dividing line between permissible state regulation of true wages and impermissible state regulation of employee benefits (such as severance and vacation benefits) under the guise of wage regulation. In so doing, this Court can confirm that, in extending ERISA's coverage to any plan, fund or program that provides vacation benefits, 29 U.S.C. § 1002(1), Congress did not intend to abandon the vast majority of the nation's vacation benefit plans and programs to a myriad of hastily contrived and conflicting state laws and regulations.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals in this case.

Respectfully submitted,

DATED: April 7, 1986

*Richard J. Simmons, P.C.
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By RICHARD J. SIMMONS, P.C.
Richard J. Simmons, P.C.

Attorneys for Petitioners
California Hospital Association,
California Restaurant Association,
California Manufacturers Association,
California Chamber of Commerce,
Merchants and Manufacturers Association,
and California Hotel and Motel
Association

* Counsel of Record

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

CALIFORNIA HOSPITAL ASSOCIATION, a non-profit California corporation; CALIFORNIA RESTAURANT ASSOCIATION, a non-profit California corporation; CALIFORNIA MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA HOTEL AND MOTEL ASSOCIATION, a non-profit California corporation,

Petitioners,

v.

PATRICK W. HENNING, as Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California,

Respondent.

On Writ Of Certiorari
To The United States Court Of
Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

APPENDICES

APPENDIX A

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ORDER

Nos. 83-6381
83-6416
D.C. No. CV 82-6659-RG

CALIFORNIA HOSPITAL ASSOCIATION, CALIFORNIA RESTAURANT ASSOCIATION, CALIFORNIA MANUFACTURERS ASSOCIATION, CALIFORNIA CHAMBER OF COMMERCE, MERCHANTS & MANUFACTURERS ASSOCIATION, and CALIFORNIA HOTEL & MOTEL ASSOCIATION,

Plaintiffs/Appellees/Cross-Appellants,

v.

PATRICK W. HENNING, Labor Commissioner, Department of Industrial Relations, State of California,

Defendant/Appellant/Cross-Appellee.

Before: BROWNING, Chief Judge, ALARCON, Circuit Judge, and SOLOMON, District Judge*.

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* Honorable Gus J. Solomon, Senior Judge, United States District Court for the District of Oregon, sitting by designation.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The suggestion for rehearing en banc is rejected.

The court's opinion in this case filed September 6, 1985 (770 F.2d 856) is amended as follows:

1. The sentence beginning at page 858, column 2, line 21 is amended to read, "Plaintiffs' vacation programs at issue in this appeal fall within this regulation."

2. The sentence beginning at page 861, column 2, line 50 is amended to read, "The Department of Labor administers ERISA and the Fair Labor Standards Act, and from 1967

through 1978 administered the Age Discrimination in Employment Act. The Department has had long experience with the varying problems and congressional policies involved with respect to each of the possible elements of the employee compensation package. It is therefore well equipped to interpret the statutes it administers in a way that will best accommodate Congress's purposes."

3. The only issue presented on appeal was whether the district court properly enjoined the enforcement of state regulatory laws as applied to unfunded vacation plans on the ground that ERISA preempted such enforcement. We held that ERISA did not apply to unfunded plans and therefore reversed the district court. The plaintiffs argue that the district court had enjoined state regulation of funded as well as unfunded plans, and thus we should have affirmed in part. The Commissioner responds that he conceeded [sic] below that ERISA preempted state regulation of funded plans, and the only issue contested and

decided in the district court was whether state regulation of unfunded plans was similarly preempted. He contends that only this issue was appealed and therefore the reversal was complete.

The principal importance of this dispute is its relation to the plaintiffs' request in the district court for an award of attorney's fees pursuant to 29 U.S.C. § 1132(g) (1982). Although plaintiffs prevailed below the district court failed to address their request for attorney's fees, and plaintiffs cross-appealed on this basis. The Commissioner concedes that the district court's failure to act on the request was error, but argues that the error was harmless because the plaintiffs should not have prevailed below.

Since the plaintiffs were not the prevailing parties on the single issue presented here, namely the application of ERISA to unfunded programs, we did not consider their cross-appeal. Plaintiffs argue, however, that they prevailed both in the district court and

in this court on the application of ERISA to funded programs, and that we therefore erred in failing to consider their cross-appeal.

Although it is clear that the only issue submitted to and considered by this court was the application of ERISA to unfunded programs, we are unable to determine on the record before us whether the application of ERISA to funded programs was litigated and decided below. If it were, the district court erred in failing to consider plaintiffs' application for attorney's fees. We therefore remand to the district court for a determination of whether the application of ERISA to funded programs was an issue litigated below on which the plaintiffs prevailed, and, if so, whether attorney's fees should be awarded.

The mandate is modified to provide the cause is remanded for further proceedings consistent with our original opinion and this order.

APPENDIX B

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OPINION

Nos. 83-6381
83-6416
D.C. No. CV 82-6659-RG

CALIFORNIA HOSPITAL ASSOCIATION, CALIFORNIA RESTAURANT ASSOCIATION, CALIFORNIA MANUFACTURERS ASSOCIATION, CALIFORNIA CHAMBER OF COMMERCE, MERCHANTS & MANUFACTURERS ASSOCIATION, and CALIFORNIA HOTEL & MOTEL ASSOCIATION,

Plaintiffs/Appellees/Cross-Appellants,

v.

PATRICK W. HENNING, Labor Commissioner, Department of Industrial Relations, State of California,

Defendant/Appellant/Cross-Appellee.

Appeal from the United States District Court for the Central District of California

Honorable Richard A. Gadbois, District Judge, Presiding

Argued and Submitted January 11, 1985
Pasadena, California

Before: BROWNING, Chief Judge, ALARCON, Circuit Judge, and SOLOMON, District Judge*.

BROWNING, Chief Judge:

Plaintiff trade associations brought this suit on behalf of employer members who have adopted vacation programs for their employees that forbid payment of prorated vacation pay, and forfeit vacation pay of employees not actively employed on specified eligibility dates (e.g., the anniversary of commencing employment). Plaintiffs sued the Labor Commissioner of the Department of Industrial Relations of the State of California seeking a declaration that a California statute barring forfeiture of vacation pay and requiring payment of a pro rata share of such pay on

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* Honorable Gus J. Solomon, Senior Judge, United States District Court for the District of Oregon, sitting by designation.

termination,1/ was preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1982).

I.

Plaintiffs based their preemption argument on 29 U.S.C. § 1144 which provides that ERISA "supersede[s] any and all State laws insofar as they may . . . relate to any employee benefit plan." "Employee benefit plans," include any "employee welfare benefit plan," id. § 1002(3), defined as "any plan, fund, or program . . . established or maintained . . . for the purpose of providing . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits." Id. § 1002(1) (emphasis added).

The Commissioner relied upon a United States Department of Labor regulation which

excludes from the definition of "employee welfare benefit plans" various "payroll practices" including the "[p]ayment of compensation, out of the employer's general assets . . . while an employee is on vaction," [sic] 29 C.F.R. § 2510.3-1(b)(3) (1983).2/ Plaintiffs' vacation programs fall within this regulation. If the regulation is valid they are not within ERISA and are not affected by ERISA's preemption provision. The sole question, therefore, is whether the regulation is valid.

II.

The agency's interpretation of the statute, embodied in the regulation, carries persuasive weight because it was formulated contemporaneously with the passage of ERISA. Watt v. Alaska, 451 U.S. 259, 272-73 (1981). The sixth circuit has accorded the regulation "great weight" in interpreting the statute. Abella v. W.A. Foote Memorial Hosp., Inc., 740

F.2d 4, 5 (6th Cir. 1984) (per curiam).

Plaintiffs invoke the doctrine that the "plain language" of the statute must be given effect "unless there is good reason to believe Congress intended the language to have some more restrictive meaning." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983). The terms "employee benefit plan" and "plan . . . providing . . . vacation benefits" have no precise and immutable meaning that excludes the construction adopted by the regulation.

Where, as here, an agency has interpreted legislation it administers with respect to an issue as to which the legislation is silent or ambiguous, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron, U.S.A., Inc. v. National Resources Defense Council, 104 S.Ct. 2778, 2782 (1984) (footnote omitted). Applying this standard in Scott v. Gulf Oil Corp., 754 F.2d 1499, 1502

(9th Cir. 1985), we sustained another aspect of the regulation involved here because we found it to be a "reasonable" construction of ERISA. It is also a reasonable and permissible construction of the statute to exclude from its coverage, as this regulation does, programs providing for the traditional vacation during which the employee continues to receive ordinary wages paid from the general assets of the business.

III.

In adopting ERISA Congress was primarily concerned with regulating private pension plans. Programs providing pensions and other fringe benefits multiplied when wage freezes were imposed during World War II and the Korean conflict. Such benefits "became a means of compensating workers in lieu of increased wages." S. Rep. No. 127, 93rd Cong., 1st Sess. 3 (1973), reprinted in 1

Legislative History of the Employee Retirement Income Security Act of 1974 587, 589 (Comm. Print 1976) [hereinafter cited as Leg. Hist.]. A wide variety of methods developed for financing and administering programs to provide these benefits. Evidence before Congress reflected two principal abuses: mismanagement of funds accumulated to finance such benefits, and failure to pay employees the benefits promised.3/

Traditional vacations during which the employer continued to pay the employees' regular wages presented neither of the evils Congress intended to address. Wages are ordinarily paid in cash out of the resources of the business whether the employee is at work or on vacation. There is no fund to administer and no special risk of loss or non-payment. Nothing in the legislative history suggests Congress intended to regulate such payments.

In the regulation involved here, the Secretary sought to clarify the line between such payments and employee fringe benefits Congress intended to regulate, in terms of the occasion for the payment, the circumstances in which it was made, and its source.

Within three months of ERISA's adoption, the Secretary announced his intention of issuing regulations "that will make it clear that other programs, including certain employer practices . . . under which employees are paid as a part of their regular compensation directly by the employer and under which no separate fund is established will not subject the employer to any filing or disclosure duties under Title I of the Act." 39 Fed. Reg. 42,236 (1974). Examples were listed, including "vacation pay." Id. The proposed rules, issued less than six months later, included the following explanation of the basis for the regulation involved here:

> [P]aid vacations . . . are not treated as employee benefit plans because they are associated with regular wages or salary, rather than benefits triggered by contingencies such as hospitalization. Moreover, the abuses which created the impetus for the reforms in Title I were not in this area, and there is no indication that Congress intended to subject these practices to Title I coverage.

40 Fed. Reg. 24,642-43 (1975).

In the preamble to the final regulation, the Secretary reaffirmed his general premise "that payment of normal compensation out of general assets while the employee performs no duties does not usually constitute a welfare plan." 40 Fed. Reg. 34,526 (1975). The Secretary has been consistent in his interpretation that vacation wages paid promptly and directly from the employer's general assets are not covered by ERISA. The advisory opinions of the Department of Labor cited by the plaintiffs are not inconsistent with this interpretation. See, e.g., Advisory Opinion 81-55A (1981); Advisory Opinion 79-89A (1979).

We recognized the reasonableness of the Secretary's interpretation of the statute in Scott, 754 F.2d at 1502. The question presented in Scott was whether state law claims for failure to provide severance pay were preempted by ERISA. In Scott, severance payments were to be made out of general assets rather than from a special fund, and the employer argued that the payments therefore should be considered a "payroll practice" rather than an employee welfare benefit. In the course of rejecting the argument we noted, "[T]he [payroll] practices described in the regulations require disbursements of funds easily analogized to ordinary wages, and the payments involved invariably take place during the term of employment." Id. at 1503. We recognized the appropriateness of excluding such vacation payments from ERISA when paid from general assets, but distinguished sever-

ance payments in light of the statute's purpose:

> [A]n employer who . . . terminates a large number of employees at once, may be faced with an extremely large severance liability. For these reasons, the danger that an employer may, because of lack of funds, default on an obligation to provide severance pay is greater than the danger of default on an obligation to provide medical leaves or vacations. This type of default is a central concern of ERISA. See 29 U.S.C. § 1001(a). . . . Therefore, it is reasonable for the Labor Department regulations to include severance pay, even when funded out of an employer's general assets, as an employee welfare benefit under ERISA, while excluding medical leaves, vacations, etc., as "payroll practices" when similarly funded.

Id.

Not only would inclusion of routine vacations-with-pay within ERISA contribute nothing to solution of the problems Congress sought to solve, it would also impose a substantial and needless burden upon employers and the federal courts. A 1983 survey reflects that paid vacations are provided to substantially all of 20,000,000 employees in medium and large

establishments. News Release 84-194, U.S. Dept. of Labor, Bureau of Labor Statistics, May 1, 1984. ERISA coverage would require compliance by each employer with numerous statutory requirements for formulating plans, establishing procedures, giving notices, and filing reports. See 29 U.S.C. §§ 1022, 1022(b), 1024(a)(1), 1024(a)(2)(A), 1024(b), 1026(a), 1133(1), (2). Any employee claiming denial of vacation leave could sue his employer in federal court. See 29 U.S.C. § 1132(a). It is unlikely Congress intended to create burdens of this magnitude without evidence of need, and without comment.

Exclusion of ordinary vacations-with-pay from the Act does not deprive the term "vacation benefits" of any meaning. By the express terms of the regulation, funding of vacations other than out of an employer's general assets is not a "payroll practice" and therefore remains subject to the statute as a "vacation

benefit." Such a plan was involved in Franchise Tax Board of California v. Construction Laborers Vacation Trust, 679 F.2d 1307, 1308-09 (9th Cir. 1982), rev'd on other grounds, 463 U.S. 1 (1983).

IV

29 U.S.C. § 1002(1)(B) includes by cross-reference "any benefit described in section 186(c) of this title," which in turn specifically refers to "pooled vacation . . . benefits" drawn from a trust fund. 29 U.S.C. § 186(c)(6) (1982). Plaintiffs argue that because of this specific reference to funded vacation plans in section 1002(1)(B) by incorporation of section 186(c), the term "vacation benefits" in section 1002(1)(A) must refer to unfunded vacation programs. It is not clear that the term "pooled vacation benefits" as used in section 186(c) includes all funded vacation benefits, but even if it did the

duplication would not appear to be significant. Many of the benefits incorporated in section 1002(1) by the cross-reference to section 1186(c) are already found in section 1002(1). Thus it is evident that Congress was not concerned with duplication, but only with assuring that all benefits covered by section 186(c) were also covered by section 1002(1). As the Department's regulations recognize, in view of the extensive overlap the entire effect of the cross-reference is simply to include within the definition of "welfare plan" the two kinds of benefits (holiday and severance benefits) not already found in section 1002(1). 29 C.F.R. 2510.3-1(a)(3); Scott, 754 F.2d at 1502.

Plaintiffs stress material in the legislative history reflecting the importance Congress placed upon protecting employees from the burden of conflicting state regulation of pension and welfare plans. This was indeed

one of the purposes of the Act, and Congress adopted a broad preemption provision to achieve it. Shaw, 463 U.S. at 105 n.25; Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522-23 (1981); Scott, 754 F.2d at 1501. 29 U.S.C. § 1144(a) provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan in section 1003(a) of this title." (Emphasis added). As this language makes clear, federal exclusivity is a corollary of regulatory coverage, not an independent statutory goal, and the Secretary has reasonably concluded that Congress did not intend to regulate unfunded vacations-with-pay. The statements in the legislative history upon which plaintiffs rely, like the language of section 1144(a), reflect a purpose to completely preempt state laws relating to matters covered by ERISA to avoid inconsistency in regulation; but they do not throw

light on what matters Congress intended to cover by ERISA in the first place.

Other federal laws regulating employee compensation do not seek to impose national uniformity through a broad preemption provision, but instead permit the states to provide more stringent protections if they wish. See the Fair Labor Standards Act, 29 U.S.C. § 218 (1982); the Age Discrimination in Employment Act, 29 U.S.C. § 633 (1982); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-4 (1982). For this reason, the distinction between "wage" compensation (not regulated by ERISA) and "benefit" compensation (regulated by ERISA) must be sensitively drawn to avoid invalidating state regulatory schemes Congress intended to encourage. Since the Department of Labor is charged with the administration of all of these statutes except Title VII, and has had long experience with the varying problems and congressional policies involved with

respect to each of the possible elements of the employee compensation package, the Department is particularly well equipped to interpret the statutes it administers in a way that will best accommodate Congress's purposes.

Plaintiffs argue Congress meant the term employee "benefits" to include both funded and unfunded vacation programs because the term was used with this meaning in two earlier statutes: 26 U.S.C. § 162(a) (1982), as interpreted in 26 C.F.R. 1.162-10(a) (1985), and 26 U.S.C. §§ 501(c)(9) (1982), as interpreted in 26 C.F.R. § 1.501(c)(9)-1 (1985). The first allows an employer to deduct as a business expense the cost of plans providing employee vacations; the second accords favorable tax treatment to employer contributions to Voluntary Employee Benefit Associations providing benefits to safeguard or improve employee health. The latter are funded plans and therefore consistent with the Secretary's

regulation. More important, neither statute has at its purpose regulating payments made to employees in order to remedy specific abuses the presence of which may depend upon whether the payments are funded or unfunded.

Finally, plaintiffs cite two ERISA provisions indicating Congress expected unfunded welfare benefit plans to be covered by ERISA, 29 U.S.C. §§ 1081, 1112(a)(1), and three provisions that expressly mention the funded/unfunded distinction with regard to certain welfare benefit plans, 29 U.S.C. §§ 1002(36), 1003(b)(5), 1051, and conclude that unfunded vacation payment plans are covered by ERISA. The Secretary's interpretation is not based on the funded/unfunded distinction alone, however, but also on the wage/benefit compensation distinction, and none of the cited sections evidence a congressional intent that wage compensation (including vacation pay) be covered by

ERISA when paid from the employer's general assets.

REVERSED AND REMANDED.

FOOTNOTES

1/ California Labor Code § 227.3 as interpreted in Suastez v. Plastic Dress-Up Co., 31 Cal.3d 774, 784, 183 Cal.Rptr. 846, 852, 647 P.2d 122, 128 (1982).

2/ The relevant portions of the regulation read in full:

> (b) Payroll practices. For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include--
>
> (1) Payment by an employer of compensation on account of work performed by an employee, including compensation at a rate in excess of the normal rate of compensation on account of performance of duties under other than ordinary circumstances, such as--
>
> (i) Overtime pay,
> (ii) Shift premiums,
> (iii) Holiday premiums,
> (iv) Weekend premiums;
>
> (2) Payment of an employee's normal compensation, out of the employer's general assets, on account of periods of

time during which the employee is physically or mentally unable to perform his or her duties, or is otherwise absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment); and

(3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example--

(i) Payment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons,

(ii) Payment of compensation to an employee who is absent while on active military duty,

(iii) Payment of compensation while an employee is absent for the purpose of serving as a juror or testifying in official proceedings,

(iv) Payment of compensation on account of periods of time during which an employee performs little or no productive work while engaged in training (whether or not subsidized in whole or in part by Federal, State or local government funds), and

(v) Payment of compensation to an employee who is relieved of duties while on sabbatical leave or while pursuing further education.

29 C.F.R. § 2510.3-1(b) (emphasis added).

3/ See, e.g., 120 Cong. Rec. 4279-80 (1974) (statement of Rep. Brademas), reprinted in 2 Leg. Hist. 3372-74; 120 Cong. Rec. 4277-78 (1974) (statement of Rep. Perkins), reprinted in 2 Leg. Hist. 3367-69; 119 Cong. Rec. 30,003 (1973) (statement of Sen. Williams), reprinted in 2 Leg. Hist. 1598-1600; see also Private Welfare and Pension Plan Legislation: Hearings on H.R. 1045, H.R. 1046, and H.R. 16462 Before the General Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st and 2d Sess. 464, 470-72 (1970) (statement of George Shultz, Secretary of Labor).

APPENDIX C

APPENDIX C

CALIFORNIA HOSPITAL ASSOCIATION, a non-profit California corporation; California Restaurant Association, a non-profit California corporation; California Manufacturers Association, a non-profit California corporation; California Chamber of Commerce, a non-profit California corporation; Merchants and Manufacturers Association, a non-profit California corporation; California Hotel and Motel Association, a non-profit California corporation, Plaintiffs,

v.

Patrick W. HENNING, Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California, Defendants.

No. CV 82-6659 RG(Gx)

United States District Court,
C.D. California,
Los Angeles Division.

Sept. 8, 1983

ORDER

GADBOIS, District Judge.

This action is before the court on cross-motions for summary judgment. There are no genuine issues of material fact, and summary judgment is appropriate for disposition of the matter.

Plaintiffs are trade associations who bring the action on behalf of themselves and their members. Both the associations and their members sponsor and administer vacation plans and programs for their employees. Defendant is the Labor Commissioner of the State of California, whose Division of Labor Standards Enforcement issued, on September 30, 1982, internal Policy and Procedure Memorandum 82-4 ("the enforcement policy"), which has the effect of regulating the vacation plans and programs of plaintiffs and their members. Plaintiffs' chief contention is that this regulation is prohibited by principles of federal preemption invoked by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, et seq. ("ERISA").1/

1/ Further references to ERISA will employ numeration of the Act itself rather than that of the United States Code.

I. EXTENT OF ERISA COVERAGE.

[1] It is plaintiffs' position that all employee vacation plans and programs are covered by ERISA. Coverage of that statute is stated in Sec. 4:

> Except as provided in subsection (b) and in sections 201, 301, and 401, this title shall apply to any employee benefit plan. . . .

Sec. 3(3) provides:

> The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee benefit plan or a plan which is both. . . .

"Employee welfare benefit plan" is, in turn, defined by Sec. 3(1) as:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, ...

[Emphasis added.]

Accordingly, it would appear from the plain language of the statute that Congress intended ERISA coverage to embrace every plan or program of an employer engaged in activities affecting interstate commerce and established for the purposes of providing vacation benefits. Defendant disputes this conclusion.

Defendant first contends that the only welfare benefit plans subject to ERISA are formal plans funded by a trust, citing § 403 and Taggart Corp. v. Life & Health Benefits Adm. Inc., 617 F.2d 1208 (5th Cir. 1980). Section 403, however, only requires a trust if specific assets are committed to a plan, as distinguished from a plan funded by an employer's general assets. With respect to Taggart, if it did in fact define employee welfare benefit plans by reference to trust funding -- a matter which is not entirely clear -- it is contrary to the statutory scheme and should be rejected in favor of the

well-reasoned opinion in Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982), which observed:

> There is no requirement of a formal, written plan in either ERISA's coverage section . . . or its definitions section. . . . Once it is determined that ERISA covers a plan, the Act's fiduciary and reporting provisions do require the plan to be established pursuant to a written instrument . . .; but clearly these are only the responsibilities of administrators and fiduciaries of plans covered by ERISA and are not prerequisites to coverage under the Act.

Id. at 1372.

In short, by referring to § 401, et seq., of the Act, defendant is trying to back into the coverage result he desires. The process is illogical. If any of the vacation plans of plaintiffs or their members should be in writing or funded by trusts and are not, the issue thus presented is compliance, not coverage.

In arguing for restricted ERISA coverage of vacation plans defendant further relies on Department of Labor regulations promulgated shortly after ERISA's enactment. 29 C.F.R.

§ 2510.3-1 was designed to clarify the definition of "employee welfare benefit plan" and to identify certain practices which are not subject to Title I. Subsection 3-1(b) excludes from the definition of "employee welfare benefit plan" --

> (3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically able to perform his or her duties and not absent for medical reasons . . . performs no duties; for example --
>
> > (i) Payment of compensation while an employee is on vacation or absent on a holiday. . . .

Plaintiffs respond that this regulation does not exempt every vacation program in which benefits are paid from general assets of the employer and observe that such a construction would undoubtedly exempt the great majority of such programs. Rather, they say, it applies only to those situations where there is an employer's discretionary "practice" rather than a plan or program to which the employer is committed, by contract or otherwise. That

is a sensible view of the regulation, since there is a decided difference between the established plan or program defined in Donovan, (i.e., (i) intended benefits, (ii) intended beneficiaries, (iii) a source of financing and (iv) a procedure for application and collection of benefits) and the situation where an employer might on occasion simply tell a worker to take a few days off. In support of their argument plaintiffs point to a number of other regulations and Department of Labor Advisory Opinions which apply Title I of ERISA to clearly unfunded programs.2/

It is not necessary to the decision in this case, however, to adopt plaintiffs' construction of subsection 3-1(b)(3). If that regulation does indeed intend ERISA exemption of every unfunded vacation program, it is at

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2/ E.g., 29 C.F.R. 2520.104-20(b)(2)(i), and Advisory Opinions 81-55A, 75-128, 78-3A.

clear odds with language of the statute itself and an invalid arrogation of power by the Department.

The conclusion is inescapable that any plan, fund, or program, as those terms are defined by Donovan, maintained for employee vacation benefits by an employer engaged in activities affecting interstate commerce, is an employee welfare benefit plan subject to ERISA coverage, irrespective of whether such arrangement is funded, trusteed, or embodied in a writing.

II. PREEMPTION OF STATE LAWS.

[2] Federal preemption in this field is stated in ERISA § 514:

> Sec. 514. (a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b).

This provision has been aptly termed the most sweeping federal preemption statute ever

enacted by Congress. Any doubt as to its ambit was recently put to rest by the Supreme Court in Shaw v. Delta Air Lines, Inc., 463 U.S. ____, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). Also addressed by Shaw is the contention of defendant that state regulation is permissible in those areas not specifically covered by ERISA. The Court observed:

> Nor, given the legislative history, can § 514(a) be interpreted to pre-empt only state laws dealing with the subject matters covered by ERISA -- reporting, disclosure, fiduciary responsibility, and the like. The bill that became ERISA originally contained a limited pre-emption clause, applicable only to state laws relating to the specific subjects covered by ERISA. The Conference Committee rejected these provisions in favor of the present language, and indicated that the section's pre-emptive scope was as broad as its language.

463 U.S. at ____, 103 S.Ct. at 2900-01. There can be no question but that the ERISA preemption provision prohibits all state regulation relating to employee welfare benefit plans.

III. THE STATE REGULATION HERE IN ISSUE.

[3] The defendant's enforcement policy has its foundation in California Labor Code § 227.3, which provides in part that, when an employee is discharged without having used his vested vacation time ". . . all vested vacation shall be paid to him as wages at his final rate in accordance with . . . [the] employer policy respecting eligibility or time served. . . ." The section also prohibits forfeiture of vested vacation time on termination. In 1982 the Supreme Court of California confronted the question of when vacation time becomes "vested." Suastez v. Plastic Dress-Up Co., 31 Cal.3d 774, 183 Cal.Rptr. 846, 647 P.2d 122. Construing § 227.3, a unanimous Court held that vacation benefits vest as labor is rendered and that an employee, on termination, must be paid -- as wages -- his prorata share of such benefits. The opinion did not discuss the issue of ERISA preemption, which was first raised in a petition for rehearing. Defendant's enforcement

policy, which sets out guidelines for administering employee claims in light of Suastez, followed the denial of rehearing by a few days.

It is obvious that the enforcement policy is a state law within the meaning of § 514, as are also Labor Code § 227.3 and Suastez, to the extent that they relate to employee welfare benefit plans. Subsection (c) of § 514 provides:

> (1) the term "state law" includes all laws, decisions, rules, regulations, or other state action having the effect of law, of any State.

As the Court in Shaw observed:

> A law "relates to" an employee benefit plan in the normal sense of the phrase, if it has a connection with or reference to such a plan.

463 U.S. at ____, 103 S.Ct. at 2900.

The enforcement policy clearly "relates to" any California vacation plan since it directly regulates participation, vesting and benefit calculation.

This court accordingly concludes that defendant's enforcement policy, insofar as it

purports to regulate those vacation plans of plaintiffs and their members which are in fact employee welfare benefit plans under ERISA, is an invalid assertion of state authority in an area which Congress specifically intended federal regulation to preempt.

Judgment is ordered for plaintiffs. Since the case is determined by ERISA preemption it is not necessary to address plaintiffs' alternative contentions.

APPENDIX D

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA HOSPITAL ASSOCIATION, a non-profit California corporation; CALIFORNIA RESTAURANT ASSOCIATION, a non-profit California corporation; CALIFORNIA MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation; MERCHANTS & MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA HOTEL & MOTEL ASSOCIATION, a non-profit California corporation,	)	No. CV 82-6659 RG (Gx)
Plaintiffs,	)	
v.		
PATRICK W. HENNING, Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California,	)	JUDGMENT
Defendant.	)	

This action came on for hearing before the Honorable Richard A. Gadbois, Jr., United

States District Judge, on June 24, 1983, the plaintiffs appearing through their counsel, Musick, Peeler & Garrett, by Richard J. Simmons, Steven D. Weinstein, and Thomas E. Hill, and the defendant appearing through his counsel, Louis Giannini. The court has reviewed the pleadings, declarations, and exhibits filed in this matter, and has considered the oral arguments of counsel. Based on the foregoing, and in accordance with the court's prior Order (Summary Judgment) dated September 8, 1983, as well as the Findings of Fact and Conclusions of Law filed herein, the court now concludes that this matter presents no genuine issues of material fact, that plaintiffs are entitled to judgment as a matter of law with respect to their first claim for relief, and that plaintiffs are further entitled to judgment as a matter of law with respect to their fourth claim for relief insofar as that fourth claim is predicated on principles of federal preemption under the Employee Retirement Income Security

Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, et seq.

IT IS THEREFORE ORDERED AND ADJUDGED:

1. That plaintiffs' motion for summary judgment be, and the same hereby is, granted.

2. That any vacation program (i) maintained by an employer engaged in activities affecting interstate commerce for the purpose of providing vacation benefits to employees, other than an employee benefit plan specified in Section 4(b) of ERISA, 29 U.S.C. § 1003(b), and (ii) which is a "plan, fund or program" is declared an employee welfare benefit plan subject to ERISA coverage, irrespective of whether such arrangement is funded, trusteed, or embodied in a writing.

3. That the decision of the California Supreme Court in Suastez v. Plastic Dress-Up Company, 31 Cal.3d 774, 183 Cal.Rptr. 846, 647 P.2d 122 (1982) ("Suastez"), California Labor Code § 227.3, and Policy and Procedure Memo 82-4 of the California Division of Labor Standards Enforcement, as modified, are

declared preempted and superseded by ERISA, 29 U.S.C. § 1144, and therefore inoperative and invalid insofar as they relate to vacation programs which are in fact employee welfare benefit plans within the meaning of ERISA as described in subparagraph 2 above.

4. That defendant, his agents, his staff, and employees of the California Division of Labor Standards Enforcement, as well as all those in active concert or participation with the aforementioned individuals, are hereby permanently enjoined from administering, implementing, or enforcing, in any manner whatsoever, Policy and Procedure Memo 82-4, or any other enforcement policy, in any manner that relates to vacation plans, funds or programs which are in fact employee welfare benefit plans within the meaning of ERISA as described in subparagraph 2 above. Those activities specifically enjoined regarding such plans, funds or programs shall include:

(a) Accepting or investigating claims or accepting assignments of claims of employees or former employees for vacation benefits;

(b) Requiring employer responses to claims of employees or former employees for vacation benefits;

(c) Conducting hearings on claims of employees or former employees for vacation benefits;

(d) Issuing, filing, or prosecuting any order, decision or award pursuant to California Labor Code §§ 98a, 98.1, 98.3, 98.4 or any other state law relating to claims of employees and former employees for vacation benefits; and

(e) Attempting in any way, through threat of civil sanctions, criminal prosecution, or otherwise, to persuade, coerce, or compel employers to comply with Policy and Procedure Memo 82-4.

5. That judgment be entered in favor of plaintiffs and that plaintiffs recover from defendant taxable costs and disbursements of

this action pursuant to 29 U.S.C. § 1132(g)(1) and/or Fed. R. Civ. Pro. 54(d) and Local Rule 15.

/S/
RICHARD A. GADBOIS, JR.
United States District Judge

DATED: 12 OCT 1983

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA HOSPITAL ASSOCIATION, a non-profit California corporation; CALIFORNIA RESTAURANT ASSOCIATION, a non-profit California corporation; CALIFORNIA MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation; MERCHANTS & MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA HOTEL & MOTEL ASSOCIATION, a non-profit California corporation,	)	No. CV 82-6659 RG (Gx)
Plaintiffs,	)	
v.		
PATRICK W. HENNING, Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California,	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
Defendant.	)	

Plaintiffs, by and through their counsel of record, hereby submit their proposed

findings of fact and conclusions of law as amended to conform to the court's Order (Summary Judgment) dated September 8, 1983.

Plaintiffs' motion for summary judgment came on for hearing before the Honorable Richard A. Gadbois, Jr., United States District Judge, on June 24, 1983, the plaintiffs appearing through their counsel, Musick, Peeler & Garrett, by Richard J. Simmons, Steven D. Weinstein, and Thomas E. Hill, and the defendant appearing through his counsel, Louis Giannini. The court has reviewed the pleadings, declarations, and exhibits filed in this matter, and has considered the oral arguments of counsel. Based on the foregoing, the court makes the following findings of fact and conclusions of law:

I.

FINDINGS OF FACT

1. This is an action for declaratory and injunctive relief and is brought pursuant

to 28 U.S.C. §§ 2201 and 2202, and 29 U.S.C. § 1132(a)(3).

2. Plaintiffs, the California Hospital Association, the California Restaurant Association, the California Manufacturers Association, the California Chamber of Commerce, the Merchants and Manufacturers Association, and the California Hotel and Motel Association (hereinafter collectively referred to as the "Associations") are nonprofit California corporations whose principal offices are located in California. The Associations are trade associations and represent a great many employers in California. The Associations have been authorized and directed to bring this action on behalf of their members, and the Associations do in fact bring this action on their own behalf and on behalf of their members.

3. Defendant Patrick W. Henning was Labor Commissioner for the State of California on December 20, 1982, the date this action was commenced. Thereafter, defendant Henning

resigned from office. In performing his duties, the Defendant Labor Commissioner administers and directs the California Division of Labor Standards Enforcement (hereinafter "DLSE"), the agency of the State of California that enforces the provisions of the California Labor Code, including Section 227.3 and other state laws, that pertain to this action. The DLSE staff, as well as its enforcement personnel (commonly referred to as "Deputy Labor Commissioners"), are agents of defendant and subject to his control and direction.

4. Defendant and the DLSE conduct their business and enforcement activities throughout the State of California, and maintain offices in Los Angeles County, California.

5. In performing their duties within Los Angeles County, California, defendant and his agents take assignments of wage and vacation benefit claims, establish rules and standards for evaluating such claims, conduct

investigations, hold administrative hearings, issue orders, decisions, and awards, and prosecute actions to enforce state laws concerning vacation benefits, including Section 227.3 and other provisions of the California Labor Code.

6. The Associations currently sponsor and administer vacation benefit plans, funds, and programs (hereinafter collectively referred to as "vacation plans") for the purpose of providing their eligible employee-participants with vacation benefits. These vacation plans provide vacation benefits based on the duration of an employee-participant's employment with the Association sponsoring the plan. The Associations' plans forbid payment of any vacation benefits to employees other than those who are actively employed on a specified eligibility date, (e.g., the anniversary of their employment commencement date), and prohibit payment of prorated vacation benefits when an employee terminates his employment prior to his eligibility date.

7. Many members of the Associations also currently sponsor and administer vacation plans, funds, and programs for the purpose of providing their employee-participants with vacation benefits. These vacation plans generally fall into three categories: (i) those vacation plans that are funded out of the general assets of the sponsoring employer; (ii) those vacation plans that pay benefits from a trust; and (iii) those vacation plans that are maintained and administered pursuant to collective bargaining agreements.

8. Many of the vacation plans sponsored by the Associations' members provide vacation benefits based on the duration of a plan participant's employment. These vacation plans generally forbid payment of any vacation benefits to employees other than those who are actively employed on a specified eligibility date (e.g., the anniversary of their employment commencement date), and prohibit payment of prorated vacation benefits when an employee

terminates his employment prior to his eligibility date.

9. Section 227.3 of the California Labor Code (hereinafter "Section 227.3") requires employers to pay vested vacation benefits to employees on termination of employment. Defendant is charged with the responsibility for interpreting and enforcing this statute.

10. On July 1, 1982, the California Supreme Court, in Suastez v. Plastic Dress-Up Co., 31 Cal.3d 774, 183 Cal. Rptr. 846, 647 P.2d 122 (1982) (hereinafter "Suastez"), interpreted Section 227.3 so as to require California employers, including the Associations and their members, to pay prorated vacation benefits to employees on termination of employment.

11. On September 30, 1982, defendant promulgated an enforcement policy with respect to Section 227.3 and Suastez, and issued defendant's Policy and Procedure Memo 82-4 (hereinafter "Enforcement Policy"). There-

after defendant amended and restated the Enforcement Policy on two occasions to clarify the manner in which the Enforcement Policy would be applied to collectively-bargained vacation plans. The Enforcement Policy articulates the rules and standards that are applied by the DLSE when enforcing Section 227.3 and Suastez. The Enforcement Policy, as amended, is currently being implemented and enforced by defendant, his agents, and employees of the DLSE against California employers, including the Associations and their members, so as to require the payment of prorated vacation benefits to all employees on termination of employment.

12. Defendant and his agents are now implementing the Enforcement Policy and are processing and investigating claims for prorated vacation benefits filed by former employees of the Associations' members. Prior to the issuance of a preliminary injunction in this matter enjoining such actions, defendant and his agents were threatening criminal and

civil sanctions, and actually imposing civil sanctions, on California employers, including the Associations' members, who failed to comply with the Enforcement Policy. Presently, defendant and his agents are scheduling and conducting hearings to adjudicate vacation benefit claims against the Associations' members, assessing liabilities against the Associations' members based on the Enforcement Policy, and attempting to induce and actually inducing settlements and compromises of claims against the Associations' members based on the Enforcement Policy.

13. Section 227.3, as construed by Suastez, directly and expressly regulates the vacation plans that the Associations and their members sponsor and maintain in the following ways:

(1) It requires that vacation benefits be paid at a specific rate of pay, i.e., the "final rate" in effect at the time of an employee's termination rather than the rate in effect when the benefits are accrued;

(2) It prohibits the forfeiture of vested vacation pay;

(3) It regulates the manner in which vacation benefits are computed and earned by mandating proration of benefits;

(4) It states that vacation benefits constitute "wages" within the meaning of the Labor Code and, consequently, that the sanctions applicable to the nonpayment of wages, such as the waiting time penalty provisions of Labor Code Section 203 and the criminal sanctions of Labor Code Section 216, are potentially applicable; and

(5) By treating vacation benefits as "wages," it requires that benefits be paid immediately on termination of employment in the event of an involuntary discharge, and within 72 hours in the case of a voluntary resignation, pursuant to Labor Code Sections 201 and 202.

14. The Enforcement Policy also directly and expressly regulates the vacation plans

that the Associations and their members sponsor and maintain in the following manner:

(1) It states that "an employee who is terminated or who terminates before an eligibility date for vacation pay, is entitled to pro rata vacation pay for time served up to the date of termination," regardless of provisions of the vacation plan or policy to the contrary;

(2) It instructs employers and Deputy Labor Commissioners to administer vacation plans so as to comply with the Enforcement Policy even where to do so would violate the language of and/or practices under such plans;

(3) It informs Deputy Labor Commissioners and all personnel of the DLSE that the DLSE has authority to process and resolve vacation benefit disputes between employers and current or former employees, including benefit disputes emanating from collective bargaining agreements.

(4) It states that "vacation accrues and vests from the moment an employee commences

employment" and thus precludes vacation plans and programs that defer accruals and/or vesting to a subsequent date;

(5) It prohibits employers from differentiating between the amount of vacation benefits accrued and the portion of such accrued benefits that are vested and nonforfeitable by making the terms "vest" and "accrue" synonymous for purposes of determining the amount of benefits owed on termination of employment;

(6) It limits "waiting periods" and "eligibility periods" during which employees may be made ineligible for any benefits to "reasonable probationary periods," and allows such eligibility periods only when a "collective bargaining agreement or employer policy is carefully worded and expressed in clear and unequivocal language" that requires that the reasonable probationary period be served "before <u>any</u> vacation pay is <u>earned</u> . . . ." This regulates the very form and language used in drafting a vacation plan or

program and the circumstances under which "eligibility periods" are permissible. Due to its retroactivity, it also operates to disqualify eligibility periods in existence during the last four years that, according to the DLSE Enforcement Policy, do not constitute "reasonable probationary periods" or are not sufficiently "clear and unequivocal;"

(7) It provides that the pro rata vacation requirements set forth in the Suastez decision apply in cases in which a collective bargaining agreement does not contain specific controlling language, regardless of past practices under the agreement that establish a different form of proration or that forfeit prorated benefits during employment under specific circumstances or on termination of employment prior to an eligibility date;

(8) It provides that temporary and part-time employees are automatically eligible to participate in an employer's vacation plan or program unless specifically informed that

they were ineligible when they commenced employment; and

(9) It recognizes and confers on current and former employees retroactive rights to prorated vacation benefits.

15. Plaintiffs contend that compliance with defendant's Enforcement Policy, Suastez, and Section 227.3, would require many of the Associations' members to maintain and administer vacation plans pursuant to collective bargaining agreements to violate the terms or requirements of those agreements, as well as the terms and requirements of vacation plans and practices under such agreements, and to administer those agreements, plans, and practices in accordance with terms imposed by defendant. Since this case can be resolved in its entirety based on plaintiffs' first and portions of their fourth claims for relief, it is unnecessary to render findings of fact or conclusions of law with respect to this collective bargaining issue.

16. In the event that any Finding of Fact shall hereinafter be determined to be a Conclusion of Law, then its includion herein shall be deemed to constitute the inclusion of that Finding of Fact as a Conclusion of Law herein.

II.

CONCLUSIONS OF LAW

1. The Associations and their members are engaged in interstate commerce, and in industries or activities affecting interstate commerce, within the meaning of 28 U.S.C. § 1337 and 29 U.S.C. § 1003.

2. This court has jurisdiction over the parties and subject matter of this action under the provisions of 28 U.S.C. §§ 1331(a) and 1337, and 29 U.S.C. § 1132(e). Venue in this court is appropriate inasmuch as the Associations' claims for relief arise in this judicial district within the meaning of 28 U.S.C. § 1381.

3. The Associations have standing to bring this action on their own behalf and on behalf of their members.

4. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, this action does not abate due to defendant Henning's resignation from the Office of Labor Commissioner, and any temporary or permanent successor to Mr. Henning that may be appointed pending resolution of this action, is automatically substituted as a party defendant to this proceeding.

5. This matter presents a "case of actual controversy" within the meaning of 28 U.S.C. § 2201, and the Associations and their members are entitled to have a declaration of their rights with respect to their claims for relief.

6. Any plan, fund, or program, as those terms are defined in Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982) (i.e., (i) intended benefits, (ii) intended beneficiaries, (iii) a source of financing and (iv)

a procedure for application and collection of benefits), that is maintained to provide employee vacation benefits by an employer engaged in activities affecting interstate commerce is an "employee benefit plan" within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), 29 U.S.C. § 1002(3), irrespective of whether such arrangement is funded, trusteed, or embodied in a writing.

7. The vacation plans of the Associations and their members are "employee benefit plans" within the meaning of Section 3(3) of the ERISA, 29 U.S.C. § 1002(3), and the Associations and their members are "fiduciaries" of their respective vacation plans within the meaning of ERISA, 29 U.S.C. § 1002(21)(a).

8. Section 227.3, Suastez, and the Enforcement Policy constitute state laws within the meaning of ERISA, 29 U.S.C. §§ 1144(a) and (c).

9. Section 227.3, Suastez, and the Enforcement Policy "relate to" the vacation

plans, funds, and programs of the Associations and their members, within the meaning of ERISA, 29 U.S.C. § 1144, in that such state laws seek to govern the terms of such plans by directly regulating participation, vesting, and benefit calculation of and pertaining to such plans.

10. Insofar as Section 227.3, Suastez, and the Enforcement Policy "relate to" the vacation plans of the Associations or their members, other than employee benefit plans specified in Section 4(b) of ERISA, 29 U.S.C. § 1003(b), they are preempted and superseded by ERISA, 29 U.S.C. § 1144, and are null and void.

11. The promulgation of defendant's Enforcement Policy, and the actions of defendant and his agents in enforcing that policy, Section 227.3, and Suastez, have caused, and unless permanently enjoined will continue to cause, the Associations and their members undue hardship and irreparable injury, for

which the Associations and their members have no adequate remedy at law.

12. Based on the foregoing, the Associations' motion for summary judgment must be granted, and judgment entered in favor of the Associations against defendant.

13. The Associations are entitled to recover from defendant taxable costs and disbursements of this action.

14. In the event that any Conclusion of Law shall hereinafter be determined to be a Finding of Fact, then its inclusion herein shall be deemed to constitute the inclusion of that Conclusion of Law as a Finding of Fact herein.

/S/
RICHARD A. GADBOIS, JR.
United States District Judge

DATED: 12 OCT 1983

APPENDIX E

APPENDIX E

CALIFORNIA HOSPITAL ASSOCIATION, a non-profit California corporation et al., Plaintiffs v. PATRICK W. HENNING, Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California, Defendant.

United States District Court, Central District of California. No. CV 82-6659. February 25, 1983.

[Statement of Case]

GADBOIS: This motion for preliminary injunction came on for hearing before the Honorable Richard A. Gadbois, United States District Judge, on February 23, 1983, the plaintiffs appearing through their counsel, Musick, Peeler & Garrett, by Richard J. Simmons and Steven D. Weinstein, and the defendant appearing through his counsel, John M. Rea and Louis Giannini. The court has

reviewed the pleadings, declarations, and exhibits filed in this matter, and has considered the oral arguments of counsel. This order is grounded on the reasoning stated in the court's order dated February 18, 1983. Based on all of the foregoing, this court now concludes that plaintiffs are entitled to a preliminary injunction.

Therefore, It Is Ordered that defendant, his agents, his staff, and employees of the California Division of Labor Standards Enforcement, as well as all those in active concert or participation with the aforementioned individuals, are hereby enjoined as described below pending a trial on the merits of this action, or until further order of this court.

(a) The employers protected by this order are the named plaintiff associations and their members as of the date hereof and thereafter until termination of this order.

(b) It is impracticable for plaintiffs to identify at this time with particularity

each protected employer. Such employers are hereby required to identify themselves to defendant's agents as association members on the first occasion at which they desire to claim the protection of this order. In that connection, plaintiffs have agreed informally to provide the defendant current published membership lists for each plaintiff association.

(c) The protection of this order is invoked by a protected employer's identifying itself per (b), above, and asserting the defense of either ERISA or NLRA preemption in a proceeding before defendant's agents or administrative tribunal.

(d) Upon claim of the benefit of this order by a protected employer, the defendant and his agents are enjoined from the threat or imposition, as to such employer, of either--

(i) civil penalties provided by Labor Code § 203 or any similar penalty in said Code relating to intentional

failure to pay as wages pro rata accumulated vacation pay; or

(ii) criminal penalties provided by Labor Code § 216 or any similar penalty in said Code relating to intentional failure to pay as wages pro rata accumulated vacation pay.

(e) This order is effective 48 hours after an endorsed filed copy is served.

(f) This order does not operate retrospectively. It applies to all cases now pending before defendant's administrative process in which final orders have not been made and all subsequent cases during pendency of the order.

APPENDIX F

APPENDIX F

[L.A. No. 31522. July 1, 1982.]

FRANCISCO SUASTEZ, Plaintiff and Respondent, v. PLASTIC DRESS-UP CO., Defendant and Appellant.

OPINION

BIRD, C.J. -- Under an employment policy providing for annual paid vacations, when does the right to a vacation "vest?"

I.

The following facts are not in dispute. Francisco Suastez, respondent, was employed by the appellant, Plastic Dress-Up Co. (Plastic Dress-Up), from October 16, 1972, until July 20, 1978. Throughout this time, and in accordance with its regular policy, the company paid Suastez weekly wages based on his hourly wage. Additionally, it provided certain fringe benefits, including holiday and vacation pay.

The company's vacation policy provided that each employee was entitled to between one

and four weeks of paid vacation annually, depending on the length of his or her employment.1/ According to testimony in the trial court, an employee did not become eligible for a paid vacation under the company's policy until the anniversary of his or her employment. Thus, Plastic Dress-Up customarily

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1/ During the years of Suastez's employment, the company changed its vacation policy twice. When Suastez was first employed, the vacation policy provided that employees would become eligible for annual vacations on June 1, provided that they had been continuously employed since June 1 of the previous year. In 1974, this policy was changed to provide that employees would become eligible for paid vacation on the date of their anniversary of employment with the company. The change was explained to the employees orally in English and in Spanish.

In 1977, the company's policy was again changed -- this time to provide more vacation time. This change was communicated orally to the employees in English and in Spanish and a written notice (in English) summarizing the policy was posted above the time clock and on the employees' bulletin board. This revised policy remained in effect at all times relevant to this appeal.

refused to pay vacation benefits to anyone whose employment was terminated before that anniversary date.2/

2/ In 1977, the company posted a notice in the workplace concerning its vacation benefits. That notice read, in relevant part:

"VACATIONS

"1 week--First Year
"2 weeks--Second Year
"3 weeks--Fifth Year
"4 weeks--Twelfth Year

"Eligibility to be on the employee's anniversary date.

"Time off must be taken during the year of eligibility. No pay will be given in lieu of vacation time.

"No carry-over of vacation from one year to the next.

"Vacation must be scheduled and approved by Management four (4) weeks prior to start of vacation.

"Payment will be made at the employee's request, providing the anniversary date has past [sic] and providing advance notice, in writing, (through Department

Suastez received vacation pay in 1974, 1975 and 1976, but took no time off. In October of 1977, immediately after his anniversary date, Suastez took a three-week paid vacation.

Midweek in July of 1978, Suastez's employment was terminated. The company paid him $68.79 as net wages for the part of the week that he had worked.3/ At that time, Suastez requested a pro rata share of his vacation pay for the period from his anniversary date (Oct. 16, 1977) until his last day of work (July 20, 1978). Plastic Dress-Up

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2/ Continued

Manager) is given two weeks prior to payment request.

"Payment will be based on forty (40) hours at the current rate of pay.

"No prorating of vacation time."

3/ Some months later, Suastez was paid his vested share in the company's profit-sharing plan.

refused to pay any pro rata vacation benefits.4/ Suastez then filed suit in the Los Angeles County Superior Court seeking damages, costs and a declaration that the company's refusal to pay him a pro rata share of his vacation pay violated California Labor Code section 227.3.5/

4/ The company's acting personnel director testified that approximately 300 people left the company's employ, for various reasons, in 1976 and 1977. None of these employees were paid pro rata vacation benefits.

5/ That section provides, "Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination. The Labor Commissioner or a designated representative, in

After a hearing, the court dismissed the complaint for lack of subject matter jurisdiction, finding that Suastez had failed to exhaust his administrative remedies. Suastez then filed a claim for pro rata vacation benefits with the Labor Commissioner. The commissioner denied the claim.6/

Suastez filed a second suit in the superior court. Plastic Dress-Up moved for summary judgment based on the parties' stipula-

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5/ Continued

the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness."

Unless otherwise indicated, all statutory references are to the Labor Code.

6/ Interestingly, the Labor Commissioner now appears as amicus curiae urging acceptance of Suastez's position. At oral argument, counsel for the commissioner explained that the initial rejection of Suastez's claim was the result of a staff member's error.

tions of fact and the transcript of the first hearing. Suastez, in turn, filed a cross-motion for summary judgment.

The trial court granted Suastez's motion, holding that section 227.3 required the company to pay Suastez the vacation pay due him "on the basis of time served." The court also awarded costs to Suastez. Plastic Dress-Up appeals from this decision.

II.

Section 227.3 provides, in part, that whenever an employee is discharged "without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with . . . [the] employer policy respecting eligibility or time served. . . ." It cautions further "that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination." The only issue raised by this appeal is when

vacation time becomes "vested" under section 227.3

The company argues that, under its vacation policy, employees are not eligible for any vacation pay unless they are still employed on the anniversary of the day they began work.7/ Employment on that date, the

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7/ This interpretation of the company's policy is by no means the only reasonable one, for the written notice of benefits is both internally inconsistent and ambiguous. For example, although the notice provides that "No pay will be given in lieu of vacation time," its later statement that "Payment will be made at the employee's request . . ." suggests that the company was willing to substitute pay in lieu of vacation time. In fact, the record shows that for three years Suastez opted to draw vacation pay instead of taking time off. Further, if the statement "No prorating of vacation time" is read together with "Time off must be taken during the year of eligibility," it could be interpreted to mean merely that an employee who was still on the payroll could not demand part of his vacation time in advance of his eligibil-

company contends, is a condition precedent to the "vesting" of vacation rights. Hence, employees terminated before their anniversary have no "vested vacation time" under this statute. For example, if an employee were terminated two days before his or her anniversary date, no vacation pay would be forthcoming even though the worker had been employed the previous 363 days.

7/ Continued

ity date. Section 227.3, of course, does not purport to limit an employer's right to control the scheduling of its employees' vacations. (See Bonn v. California State University, Chico (1979) 88 Cal.App.3d 985, 991-992 [152 Cal.Rptr. 267]; 48A Am.Jur.2d, Labor and Labor Relations, § 1825, p. 269.)

In light of this inconsistency and ambiguity, if this court were asked to interpret this notice, it might conclude that the company was obliged, by the terms of its own policy, to pay Suastez pro rata vacation pay. However, since Suastez does not contest the accuracy of the company's interpretation of the policy, that issue is not before this court.

(1a) Suastez counters that an annual paid vacation is earned by labor performed throughout the year, and "vests" as it is earned. Thus, he argues, an employee who works for some part of a year has a "vested" right to a proportionate share of his or her vacation pay.

When considering the meaning of the phrase "vested vacation time" as used in section 227.3, it is important to keep in mind the nature of vacation pay. (2) It is established that vacation pay is not a gratuity or a gift, but is, in effect, additional wages for services performed. (People v. Bishopp (1976) 56 Cal.App.3d Supp. 8, 11 [128 Cal.Rptr. 923]; see generally Giacomini, Advising Cal. Employers (Cont.Ed.Bar 1981) § 1.25, p. 23; 51 C.J.S., Labor Relations, § 243, p. 1078.) In an early, oft-cited case determining employees' rights to vacation pay under a collective bargaining agreement, Judge Augustus Hand wrote, "A vacation with pay is in effect additional wages. It involves a

reasonable arrangement to secure the well being of employees and the continuance of harmonious relations between employer and employee." (In re Wil-Low Cafeterias (2d Cir. 1940) 111 F.2d 429, 432.) The consideration for an annual vacation is the employee's year-long labor. Only the time of receiving these "wages" is postponed. (Ibid.)

"Many tribunals have taken the view that vacation pay is simply an alternate form of wages, earned at the time of other wages, but whose receipt is delayed." (Local U. No. 186, Packinghouse F. & A. Wkrs. v. Armour & Co. (6th Cir. 1971) 446 F.2d 610, 612, cert. den., 405 U.S. 955 [31 L.Ed.2d 231, 92 S.Ct. 1170]; see, e.g., Schneider v. Electric Auto-Lite Company (6th Cir. 1972) 456 F.2d 366, 371; United States v. Munro-Van Helms Company (5th Cir. 1957) 243 F.2d 10, 13; Valeo v. J. I. Case Co. (1963) 18 Wis.2d 578, 583-587 [119 N.W.2d 384, 387-389], and cases cited therein.)

This court, too, has adopted the view that vacation pay is simply a form of deferred compensation. "It would seem clear that the purpose of [providing vacation pay] is to offer a reward of additional wages for constant and continuous service. As Judge Magruder in Goodall-Sanford, Inc. v. United Textile Workers [(1st Cir. 1956)] 233 F.2d 104, pointed out, there is an 'increasingly complex use of compensation in the form of "fringe benefits," some types of which inherently are not payable until a time subsequent to the work which earned the benefits. . . .' (233 F.2d at p. 110.)" (Posner v. Grunwald-Marx, Inc. (1961) 56 Cal.2d 169, 186 [14 Cal.Rptr. 297, 363 P.2d 313].)

In this respect, vacation pay is similar to pension or retirement benefits, another form of deferred compensation. Those benefits, too, "do not derive from the beneficience of the employer, but are properly part of the consideration earned by the employee."

(In re Marriage of Fithian (1974) 10 Cal.3d 592, 596 [111 Cal.Rptr. 369, 517 P.2d 449].)

(1b) This court has never before considered the question of when vacation pay vests under section 227.3. It did, however, recently have occasion to review and reconsider when pension rights "vest." In Miller v. State of California (1977) 18 Cal.3d 808, 815 [135 Cal.Rptr. 386, 557 P.2d 970], this court held that "the right to pension benefits vests upon the acceptance of employment [citations], even though the right to immediate payment of a full pension may not mature until certain conditions are satisfied. As we stated in Kern [v. City of Long Beach (1947) 29 Cal.2d 848, 855], 'It is true that an employee does not earn the right to a full pension until he has completed the prescribed period of service, but he has actually earned some pension rights as soon as he has performed substantial services for his employer. [Citations.] He is not fully compensated upon receiving his salary payments because, in

addition, he has then earned certain pension benefits, the payment of which is to be made at a future date.'" Although the right to a pension may still be, in whole or in part, subject to forfeiture upon the happening of certain contingencies, that does not prevent the right from vesting. (Ibid.)

Similarly, since the consideration for an annual vacation is the labor performed throughout the year, an employee whose employment is terminated midyear has not earned a full vacation. Nonetheless, the employee has earned some vacation rights "'as soon as he has performed substantial services for his employer'" (Miller, supra, 18 Cal.3d at p. 815, quoting Kern v. City of Long Beach (1947) 29 Cal.2d 848, 855 [179 P.2d 799]). The right to some share of vacation pay vests, like pension rights, on acceptance of employment. Nonperformance of a condition subsequent, such as Plastic Dress-Up's requirement that employees remain until their anniversary, can, at most, result in a forfeiture of the

right to a vacation; it cannot prevent that right from vesting.

Courts in other jurisdictions which have considered whether discharged or striking employees have a "vested" right to a pro rata share of vacation pay have uniformly held that the right vests as services are rendered. "'It is beyond dispute that an agreement to pay vacation pay to employees made to them before they performed their services, and based upon length of service and time worked, is not a gratuity but is a form of compensation for services, and when the services are rendered, the right to secure the promised compensation is vested as much as the right to receive wages or other form of compensation.'" (Livestock Feeds v. Local Union No. 1634 (1954) 221 Miss. 492, 502-503 [73 So.2d 128, 132], quoting Textile Workers Union v. Paris Fabric Mills (1952) 18 N.J. Super. 421 [87 A.2d 458, 459], aff'd. 22 N.J. Super. 381 [92 A.2d 40, 41]; accord Valeo v. J. I. Case Co., supra, 18 Wis.2d at pp. 585-586 [119 N.W.2d at

p. 388]; see the discussion of the trend to grant vacation on a pro rata basis to laid-off employees in Amalg. Butcher Workmen Loc. Un. No. 641 v. Capitol Pack Co. (10th Cir. 1969) 413 F.2d 668, 672, fn. 5) Like the California courts' treatment of pension rights, these courts sometimes caution that the right to a vacation, even if vested, may be forfeited if a condition subsequent is not met.8/

If vacation pay "vests" as it is earned, the company's requirement of employment on an anniversary date cannot prevent the right to pay from vesting. At most, it is a condition subsequent which attempts to effect a forfeiture of vacation pay already vested. (Cf. Miller v. State of California, supra, 18 Cal.3d at pp. 815-817.) Under section 227.3, of course, such a forfeiture is forbidden: "an

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8/ See, e.g., Textile Workers Union v. Paris Fabric Mills (1952) 22 N.J. Super. 381 [92 A.2d 40, 41]; Briggs v. Electric Auto-Lite Co. (1967) 37 Wis.2d 275, 279 [155 N.W.2d 32, 35].

employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination." (Italics added.)

The company argues, though, that its eligibility requirement is not merely a condition subsequent that would effect a forfeiture of vested vacation rights. Rather, Plastic Dress-Up characterizes it as a condition precedent that prevents those rights from vesting at all. In support of its contention, several California cases are cited which have enforced conditions like the one at issue here and labeled them conditions precedent. (See Division Lab. L. Enfmt. v. Anaconda Min. Co. (1955) 138 Cal.App.2d 92 [291 P.2d 169]; Division Labor Law Enf. v. Standard Coil etc. Co. (1955) 136 Cal.App.2d Supp. 919 [288 P.2d 637]; Div. of Lab. L. Enf. v. Mayfair Mkts. (1951) 102 Cal.App.2d Supp. 943 [227 P.2d 463].)

These cases, however, were decided before the enactment of section 227.3, and never considered the question of when and whether the

right to vacation pay vested. (3)(See fn. 9.) They merely interpreted the language of the agreements before them.9/ In part, too, they relied on what is now an outdated notion of the nature of vacation pay. For example, in Mayfair Markets the court implied that vacation pay "was an inducement to the plaintiff to continue in defendant's employ, and was in fact a supplemental contract. . . ." (Div. of Labor L. Enf. v. Mayfair Mkts., supra, 102 Cal.App.2d Supp. at p. 949.)

(1c) If vacation pay served simply to induce employees to remain on the job for a certain period of time, then interpreting eligibility requirements as a condition precedent to the vesting of vacation pay would not be unreasonable. However, once it is

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9/ Additionally, although decisions of the appellate department have persuasive value, they are "of debatable strength as precedents," and "are not, of course, binding on . . . the higher reviewing courts. . . ." (6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 671, p. 4584.)

acknowledged that vacation pay is not an inducement for future services, but is compensation for past services, the justification for demanding that employees remain for the entire year disappears. If some share of vacation pay is earned daily, it would be both inconsistent and inequitable to hold that employment on an arbitrary date is a condition precedent to the vesting of the right to such pay. (See Brookford Mills v. Textile Workers Union of America (1957) (Jaffe, Arb.) 28 Lab.Arb. 838, 841; Daykin, Vacation Rights Under Collective Bargaining Agreements (1962) 17 Arb.J. 34, 36.)

The language of section 227.3 does not support a contrary result. The company relies on this passage from the statute: "all vested vacation time shall be paid to [the employee] as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served. . . ." (Italics added.) The company contends that this passage is evidence of a legislative

intent that the employer's policy determine the time of vesting. A careful reading of the statute, however, indicates that the passage only means that the amount of vacation pay an employee is entitled to be paid as wages is to be determined with reference to the employer's policy. The typical vacation policy provides that the amount of vacation time for which an employee is eligible depends on, among other things, the length of employment with the company and the title or position the employee holds. The Legislature has left the determination of these variables to the employer or the bargaining table. If the Legislature had intended the contract to control the time of vesting, it could easily have drafted the statute to compel such a result. It did not.

Finally, it is noted that further support for this interpretation of the statute may be found in the Legislature's 1976 amendment to section 227.3 (Stats. 1976, ch. 1041, § 2, p. 4653.) That amendment added this sentence: "The Labor Commissioner or a designated repre-

sentative, in the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness."

Even before the enactment of section 227.3, California courts had applied the principles of equity and fairness to allow laid-off employees to recover pro rata vacation benefits in certain circumstances. Courts have allowed recovery for vacation pay despite the fact that contract eligibility requirements were not met, if the employee had substantially performed. (Div. Labor L. Enf. v. Ryan Aero Co. (1951) 106 Cal.App.2d Supp. 833 [236 P.2d 236, 30 A.L.R.2d 347]; see Division Labor L. Enf. v. Standard Coil etc. Co., supra, 136 Cal.App.2d Supp. at pp. 924-925; Div. of Lab. L. Enf. v. Mayfair Mkts., supra 102 Cal.App.2d Supp. at pp. 948-949; cf. Division of Labor Law Enforcement v. Transpacific Transportation Co. (1979) 88 Cal.App.3d 823, 830 [152 Cal.Rptr. 98].)

This court has recognized that the "frustration of purpose" doctrine can also

afford relief. "If the purpose of requiring employment on a certain date was to induce employees to remain in the employment, it may reasonably be argued that the purpose of the contingency was frustrated by the closing of the plant and the employees should be excused from performance of the condition precedent." (Posner v. Grunwald-Marx, Inc., supra, 56 Cal.2d at p. 189.)10/ Thus, California courts have already recognized that the principles of

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10/ Other courts have also recognized the role of equity and justice. (See, e.g., Livestock Feeds v. Local Union No. 1634, supra 221 Miss. at p. 506 [73 So.2d at p. 133] ["It seems clear to us that if vacation pay is additional wages, the employee is, in justice and right, entitled to a pro-rata share thereof if the employment be earlier terminated by his employer"]; Textile Workers Union of America v. Brookside Mills (1957) 203 Tenn. 71, 78-79 [309 S.W.2d 371] ["fair dealing and common justice require that we affirm the . . . holding that these complainants are entitled to vacation pay"].)

Affirming an arbitrator's award of vacation benefits to laid-off employees, one court noted, "'It is certain that vacation pay is a right which more often

equity and justice weigh in favor of granting relief to employees who are denied payment for earned vacation pay.

10/ Continued

than otherwise survives the expiration of the agreement and "vests" in the employee as he goes about his chores from day to day. Where a plant has been shut down or the employer has gone out of business and the collective bargaining agreement has been terminated, courts, as well as arbitrators, tend to grant vacation on a pro rata basis for the period during which the employees have served notwithstanding the fact that they may not have met the requirement that they be in the employer's employ on a specific date. In some of these cases arbitrators have . . . rationalized the result by holding that the employees were merely "laid off" and retained their rights as employees, or have interpreted the eligibility date merely as a "calculation date."' Labor Arbitration and Industrial Change, BNA, 1963, p. 198." (Amalg. Butcher Workmen Loc. Un. No. 641 v. Capitol Pack Co., supra 413 F.2d at p. 672, fn. 5.)

III.

The right to a paid vacation, when offered in an employer's policy or contract of employment, constitutes deferred wages for services rendered. Case law from this state and others, as well as principles of equity and justice, compel the conclusion that a proportionate right to a paid vacation "vests" as the labor is rendered. Once vested, the right is protected from forfeiture by section 227.3. On termination of employment, therefore, the statute requires that an employee be paid in wages for a pro rata share of his vacation pay.11/

The judgment is affirmed.

Mosk, J., Richardson, J., Newman, J., Kaus, J., Broussard, J., and Reynoso, J., concurred.

11/ As noted above, the statute provides that the amount of vacation pay earned shall be determined "in accordance with [the] contract of employment or employer policy respecting eligibility or time served. . . ." (§ 227.3)

Appellant's petition for a rehearing was denied September 22, 1982. Richardson, Jr., was of the opinion that the petition should be granted.

APPENDIX G

APPENDIX G

State of California

Memorandum

To: All Personnel Date: September 30, 1982

From: Department of Industrial Relations
Patrick W. Henning
State Labor Commissioner

Subject: Policy and Procedure Memo 82-4
Suastez vs. Plastic Dress-Up Co. and Pro Rata Vacation Pay
SUPREME COURT ACTION

On September 22, 1982, the California Supreme Court denied rehearing in the Suastez v. Plastic Dress-Up Co. case. In so doing, the Court once more affirmed the judgment of the trial court in favor of Respondent employee, Suastez.

To reiterate the terms of Policy and Procedure Memorandum 82-4 of July 15, 1982, this decision means that an employee who is terminated or who terminates before an eligibility date for vacation pay, is entitled to pro rata

vacation pay for time served up to the date of termination.

In light of the denial of rehearing in the Suastez case, we are immediately to resume processing claims for pro rata vacation pay, and to apply the principles of this case, as follows:

1. Vacation accrues and vests from the moment an employee commences employment; and upon termination of employment, short of reaching any so-called eligibility date for entitlement to a full vacation, the employee is entitled to a pro rata share of vacation pay as accrued and vested, for time served;

2. The accrual rate will be based on employer policy;

3. If a collective bargaining agreement has pro rata vacation provisions, the agree-

ment as far as pro rata vacation pay is concerned shall control, unless to do so would violate the spirit, if not the terms, of Suastez. If there is no controlling language in the collective bargaining agreement, the pro rata vacation requirements set forth in the decision apply.

4. Where a collective bargaining agreement or employer policy is carefully worded and expressed in clear and unequivocal language, which provides for the serving of a reasonable probationary period before any vacation pay is earned, such provision would be permissible;

5. Where a pro rata vacation claim is based on temporary or part-time employment, we shall recognize the claimant's entitlement to pro rata vacation pay, unless on commencement of employment it was made clear to the employee that he(she) was

not entitled to any vacation at all for part-time or temporary work.

6. The Suastez decision applies retroactively, and the Division shall accept claims and cases which have not otherwise been decided by the courts or the Division, provided the claim arose within the applicable period of limitations. (Two years on an oral contract, and four years on a written contract).

The rationale in favor of giving retroactive effect to this decision is that the Court merely interpreted existing law, and this should be distinguished from making law (that is, enacting new legislation and applying the provisions of same retroactively to affect certain past acts committed when there was no such law in existence).

/S/
Patrick W. Henning

APPENDIX H

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR
FOR WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

DAN W. JAMES et al

versus CIVIL ACTION NO. 85-0113

T.G.&Y. STORES COMPANY

MEMORANDUM RULING

Sixteen former employees of defendant sue to recover vacation and severance pay purportedly promised to them by defendant prior to their termination. Suit originally was filed in the First Judicial District Court, Caddo Parish, Louisana. Alleging diversity of citizenship and a sufficient amount in controversy, defendant removed to federal court. Defendant has now filed a motion to dismiss and the plaintiffs now ask the court to remand this matter to state court.

The original complaint alleges that defendant notified its employees, including plaintiffs, of its intention to close its Shreveport Warehouse. The same document which notified plaintiffs of the impending closure of the warehouse also indicated that fulltime regular employees who remained on the job until dismissal or the closing of the store would receive severance pay, in keeping with company policy. Plaintiffs also allege that the company had a long-standing practice of reimbursing employees for unused vacation time. In both instances, the amount of severance or vacation pay was computed on the employee's standard rate of pay and length of service. Plaintiffs seek payment for accrued vacation time pay and severance pay under La. R.S. 23: 632. Due to defendant's purported refusal to supply plaintiffs' records, plaintiffs failed to allege specific dollar amounts due to them.

Defendant's motion to dismiss is founded upon its contention that La. R.S. 23:632 has

been preempted by the Employees Retirement Income Security Act ("ERISA"). The purpose of ERISA is to protect an employee's interest in benefit plans by subjecting administration of those plans to federal regulations. 29 U.S.C. § 1001. Under the Act, an employee welfare benefit plan is any

> plan, fund, or program . . . established or maintained by an employer . . . for the purpose of providing its participants or their beneficiaries, through the purchase of insurance or otherwise . . . vacation benefits.
> . . .

29 U.S.C. § 1003. A right of action is accorded to a participants seeking to recover benefits to him under the terms of a plan covered by ERISA. 29 U.S.C. § 1132(a)(1)(B). Section 1132 also provides that an action by a participant to recover benefits under a plan may be brought in a United States District Court without respect to the citizenship of the parties or the amount in controversy. 29 U.S.C. §§ 1132(e)(1) and 1132(f). Finally, the preemptive limits of ERISA are defined in 29 U.S.C. § 1144, as follows:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in § 1003(a) of this title and not exempt under § 1003(b) of this title . . . .

In support of its position, defendant cites Shaw v. Delta Airlines, Inc., ___ U.S. ___, 103 S.Ct. 2980 (1983). In that case, the Supreme Court held that New York's Human Rights Law was preempted by ERISA, despite the fact that the New York law sought to prohibit discrimination based on sex is disability payments rather than regulating the disability plan itself. The court concluded that Congress intended to use the words "relate to" in § 1144 in their broadest sense. The expansive scope given to § 1144 in Shaw should also be applied to subject La. R.S. 23:632 to preemption by ERISA, according to defendant. In response to Shaw, at least one district court has concluded that ERISA preempts state laws which regulate payment for accrued vacation time. In California Hospital Association v.

Henning, 569 F.Supp. 1544 (C.D. Ca. 1983), the court held that Shaw left "no question but that the ERISA preemption provision prohibits all state regulation relating to employee welfare benefit plans." Id. at 1547. In Henning, plaintiffs were trade associations and their members who challenged California's enforcement scheme for regulating vacation plans. Section 227.3 of the California Labor Code required an employer to pay a discharged employee, who had not used all of his earned vacation time to be paid "all vested vacation . . . as wages at his final rate in accordance with . . . [the] employer policy respecting eligibility or time served. . . ." Id.

La. R.S. 23:631 provides:

> Any employer who fails or refuses to comply with the provisions of R.S. 23:631 shall be liable to the laborer or other employee for his full wages from the time the demand for payment by the discharged or resigned laborer or employee was made, until the employee shall pay or tender payment of the amount due to such laborer or other employee.

La. R.S. 23:631 requires an employer to pay a discharged employee within 24 hours after termination. Plaintiffs seek the benefit of this statute contending that the amounts due to them constitute earned wages rather than money due under a benefit plan. In resisting defendant's motion, plaintiffs cite Franchise Tax Board, etc. v. Construction Laborers, etc., 679 F.2d 1307 (9th Cir. 1982). According to plaintiffs, Franchise Tax Board draws a distinction between earned wages in the form of vacation pay and employee benefit plans regulating vacation pay. In Franchise Tax Board, three union members owed the State of California personal income tax. The tax board attempted to levy against money held in trust for the three union members by the construction laborer's vacation trust fund. The trustees refused to pay the money owed, and the State brought an action for declaratory relief. The Ninth Circuit held that the State's levy laws were preempted by ERISA which protected the funds from levy. The

trust was structured so that laborers were given a check for accumulated vacation benefits. The court concluded that the trust fund was a benefit plan under 29 U.S.C. § 1002(1), explaining:

> ERISA does not in so many words protect vacation trusts from creditors' claims, as it does protect pension plans. 29 U.S.C. § 1056(d)(1). Extending similar protection to vacation funds is consistent with the statute, however, if not demanded by it. Both types of ERISA plans have the same goal: to provide accumulated money to a worker for future beneficial use. The worker's money deserves trust protection from dissipation regardless of the purpose for which the money has been set aside under ERISA.

Id. at 1309.

The conclusion to be drawn from analysis of the cases cited about is that ERISA preempts La. R.S. 23:632. Shaw indicates that the provisions of ERISA are to be accorded broad construction. Standing alone, the policy considerations expressed in Shaw are probably sufficient to conclude that § 1002(1) applies to the vacation benefit program in this case. In addition to Shaw, however, the court finds the reasoning applied in Henning

to be persuasive. The court does not find the distinction perceived by plaintiffs in Franchise Tax Board. Instead, that case supports the position of defendant that ERISA governs this matter. Consequently, jurisdiction is vested in this court under the provisions of 29 U.S.C. §§ 1132(e)(1) and 1132(f). By finding that federal question jurisdiction exists, remand is obviously inappropriate. Accordingly, plaintiffs' motion to remand will be DENIED. Similarly, in reaching the conclusion advanced by defendant, the court cannot order dismissal. Since ERISA preempts § 632, plaintiffs are clearly accorded the right to seek recovery of benefits due under the vacation plan under § 1132. Consequently, defendant's motion to dismiss will be DENIED.

An Order consistent with the terms of this Memorandum Ruling will issue herewith.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 13th day of May, 1985.

TOM STAGG, CHIEF JUDGE

APPENDIX I

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
AT WHEELING

BARBARA G. HOLLAND,	)	C. A. No.
	)	83-0033-W(M)
Plaintiff,	)	
	)	
v.	)	
	)	
NATIONAL STEEL CORPORATION,	)	
	)	
Defendant.	)	

MEMORANDUM ORDER GRANTING
SUMMARY JUDGMENT TO DEFENDANT

Defendant has filed a motion for summary judgment as to all Counts of the Complaint, together with supporting memoranda. Plaintiff opposed the motion on the grounds, inter alia, that there were disputed issues of material fact and that defendant was not entitled to judgment as a matter of law, even if the facts were not in dispute.

The Court finds that there are no material issues of fact precluding summary judgment and that defendant is entitled to judgment as a matter of law.

In the First Cause of Action of the Complaint, plaintiff alleges that she relied upon provisions of the then existing collective bargaining agreement between defendant and the Union to the effect that she had the ability to return to the hourly ranks at any time after her promotion to a management position as foreperson, which position was outside of the collective bargaining agreement. Complaint, First Count, paragraph (6). At her deposition, her testimony was consistent with the Complaint; i.e., that she relied upon the then existing provisions of the labor agreement in believing that she had the ability to return to hourly ranks if she so desired. Between the time she accepted the management position (1978) and the time she wished to return to the hourly ranks (1982) because of layoff as a foreman, the collective bargaining agreement was amended (1980) to change the provisions with the effect that, in 1982, that provision no longer permitted her return in the circumstances.

Plaintiff contends that the source of her right to return to the hourly ranks was not the labor agreement, but her own contract of employment with defendant which consisted of a promise by defendant, separate and independent of the labor agreement, that she could return to the hourly ranks at her request. Plaintiff does not rely upon a different fact or additional facts in making this argument. Rather, it is a matter of examining the pleadings and her own testimony and determining whether those facts so revealed could, as a matter of law, support a claim that a promise separate and apart from the provisions of the labor agreement existed.

At most, the uncontroverted facts only admit to the claim that in 1978, plaintiff had such rights, if any, to return as may be found solely in the labor agreement provision in 1978.

The Court finds the pleadings and her testimony preclude the assertion of a claim that the source of her alleged right to return

was other than the provisions of the collective bargaining agreement as they existed in 1978. Having determined that the source of her alleged right to return was the collective bargaining agreement, the subsequent amendment of that agreement admittedly foreclosing any ability to return, makes it unnecessary to decide if the pre-amendment language in fact provided the absolute right to return as she contends.

That defendant and the Union subsequently amended the provision of the labor agreement in 1980 to foreclose her return in 1982 does not state a claim upon which relief can be granted. See Cooper v. General Motors Corp., 651 F.2d 249 (5th Cir. 1981).

In the Second Cause of Action of the Complaint, plaintiff claims breach of contract under state law for defendant's alleged failure to pay her certain Extended Vacation benefits due her upon her layoff in 1982. Plaintiff also asserts that such Extended Vacation benefits were wages under the West

Virginia Wage Payment and Collection Act and thus seeks a remedy under that statute of payment, liquidated damages, prejudgment interest and attorneys' fees. Plaintiff asserts a contractual and statutory right to receive such benefit payments while defendant asserts that such claim cannot be made under state contract law or state statute because it is preempted by the federal law established under the Employee Retirement Income Security Act of 1974, as amended. The Court finds that Extended Vacation benefits are an employee benefit plan within the meaning of ERISA, 29 U.S.C. § 1003 and, as such, federal law preempts the state law claim as to alleged right to receive the benefit or the time of its payment.

In the Third Cause of Action, plaintiff claims a right of recovery under the West Virginia Wage Payment Statute of Wages (consisting of regular wages and regular vacation benefits) due her by her next regular payday after her alleged date of layoff of March 6,

1982. Because federal law preempts the state statute as to the entitlement to and time of receipt of regular vacation benefits, this part of the Third Cause of Action fails to state a claim upon which relief can be granted on the basis of the authorities cited above in the discussion of the Second Cause of Action.

Even if the state statute was not preempted as to both regular and Extended Vacation benefits, plaintiff's claims for liquidated damages would fail under the state statute. Liquidated damages and accrued fringe benefits (which would encompass both types of vacation) are only available if the accrued fringe benefit is not paid by the next regular payday after layoff. Plaintiff argues that March 6, 1982, her last day of actual work, should constitute her date of layoff under the statute. Defendant asserts that her layoff cannot begin until at least April 2, 1982, her last day of vacation period after her last day of actual work.

Which date is determined to be the date of layoff is important, for if March 6, 1982 is the layoff date under the statute, then the presence of other defenses requiring resolution of disputed facts precludes summary judgment for defendant. On the other hand, if April 2, 1982 is the earliest possible layoff date, then defendant owed plaintiff neither regular wages or vacation benefits after that date because she had received same by payment of March 31, 1982.

The Court finds the question of which date is the date of layoff under the statute to be a question of law. The statute should be interpreted in a common sense manner in view of its apparent purpose. In this case, the defendant is alleged to have required plaintiff to take her vacation during the period between March 6 and April 2, 1982, in anticipation that no work would be available for the plaintiff. There is nothing in the statute which prohibits an employer from requiring an employee to take available

vacation before the employer separates the employee from its active work force. In this case, while on vacation, plaintiff continued to be treated as an active employee. As of April 2, 1982, she became eligible to receive payments pursuant to the defendant's Income Protection Plan, which benefits, when added to her state unemployment compensation (which she was also eligible to receive after April 2, 1982) amounted to 75% of her base salary.

Section 21-5-4 of the West Virginia statute is headed in part, "employees separated from payroll before paydays". Section 2.10 of the state regulations pertaining to the statute defines layoff as "an involuntary cessation of an employee". Reading the statute heading and regulation together, it makes sense that neither an involuntary cessation nor a separation from the payroll occurred to plaintiff on March 6, 1982 when she was placed on vacation.

Therefore, the Court finds that plaintiff's earliest possible date of layoff was

April 2, 1982. Because she was paid the vacation benefits and regular wages due her on March 31, 1982, defendant owed her nothing after April 2, 1982. Thus, there is no basis for a claim under the statute of failure to pay regular wages or fringe benefits after layoff.

There remains the issue of whether defendant violated the statute by failing to pay plaintiff her regular wages earned in the first week of March of 1982 within the two-week period set forth in Section 21-5-3. It is not controverted that plaintiff was paid these regular wages on March 31, 1982, eleven months before this action was filed. The statute's imposition of interest (§ 21-5-6) and attorneys' fees (§ 21-5-12) for collection of unpaid wages is only available if the regular wage itself could also be collected in the suit. This is not the case in this action as plaintiff has been paid her regular wages. Therefore, any claims for interest or attorneys' fees are not available or are moot.

Defendant's motion for summary judgment on all Causes of Action of the Complaint is GRANTED and the Complaint is therefore DISMISSED.

ENTERED: June 10, 1985.

/S/
United States District Judge

Consented to in form and substance:

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APPENDIX J

APPENDIX J

394 Mass. 830

Lawrence BARRY et al.[1]

v.

DYMO GRAPHIC SYSTEMS, INC. et al.2

Supreme Judicial Court of Massachusetts, Middlesex.

Argued March 4, 1985.

Decided May 20, 1985

Before HENNESSEY, C.J., and WILKINS, ABRAMS, NOLAN and LYNCH, JJ.

NOLAN, Justice.

The defendants, Dymo Graphic Systems, Inc. (DGS), and Esselte Pendaflex Corporation

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1. Alain Hanover.

2. Esselte Pendaflex Corporation. Dymo Graphic Systems, Inc. (DGS), was a wholly owned subsidiary of Dymo Industries, Inc. (Dymo). After commencement of this action, Dymo assumed all assets and liabilities of DGS through a series of corporate acquisitions and mergers. Dymo changed its name to Esselte Pendaflex Corporation (Esselte). The plaintiff filed a substitute complaint, naming Esselte as a defendant, to address corporate changes.

(Esselte), appeal from a Superior Court judgment which awarded the plaintiff Lawrence Barry $3,577.50 damages for severance pay and the plaintiff Alain Hanover $1,123.08 damages for vacation pay, plus interest and costs to each plaintiff. The defendants also appeal from the judge's order that this case proceed on a "test case" basis with a stipulation DGS filed pursuant to the order.[3]

The defendants' underlying obligation allegedly arises out of a plan for employee severance and vacation benefits. For the first time on appeal, the defendants raise the issue whether the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1982) (ERISA), preempts the application of State law to a determination of the defendants' obligation under this employee benefits plan. For the reasons stated below, we conclude that the judge properly ordered

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3. DGS filed the stipulation prior to the plaintiffs' substitute complaint which named Esselte as a defendant.

this case to proceed as a test case and that ERISA preempts the application of State law to this case. We remand this matter to the Superior Court to determine whether the defendants' interpretation of the plan was arbitrary and capricious.

We summarize the relevant facts as found below. In April, 1975, and October, 1976, DGS acquired Photon, Inc., and Xylogic Systems, Inc., respectively. Prior to the acquisitions, Barry was an employee of Photon and Hanover was an employee of Xylogic. They continued in substantially similar jobs with DGS after the acquisitions. During each acquisition, the president of DGS met with the employees of the prior concern and informed them that they would receive equal or better benefits and salary through employment with DGS. As part of the benefits, DGS credited former Xylogic and Photon employees with the years of service with their prior employers. In addition, DGS issued booklets to its employees in July, 1976, and July, 1977, which

stated the benefits of DGS, including severance and vacation pay.

In March, 1977, Hanover, a supervisory employee, received a looseleaf manual entitled "Personnel Policies" (manual). This manual detailed the personnel benefits, policies, and practices of DGS. It indicated that the severance pay policy provided one week's pay for each year of service, "[i]f an employee's position is eliminated through reorganization or layoff, and he/she is forced to separate from the company through no fault of his/her own. . . ." The vacation policy contained a vacation eligibility schedule and stated that "[v]acation credit may not be accrued or carried over from year to year." DGS, however, acquiesced in the carryover of and occasionally authorized employees to carryover vacation credits in order to accommodate production schedules.

Although DGS distributed the manual only to supervisory employees, it was available to all employees on request. Hanover read the

manual, availed himself of the described benefits, and used it to explain personnel policies to employees under his supervision. Barry read the manual in the DGS personnel office in 1977, and again saw it in 1978.

On March 21, 1979, Barry, Hanover, and other DGS employees received a memorandum from the DGS president which informed them of the imminent takeover of DGS by Itek Corporation (Itek). The memorandum indicated that Itek would offer most DGS employees continued employment. DGS would provide severance benefits in excess of those delineated in the manual to those employees not offered continued employment with Itek. Employees offered continued employment with Itek would not be eligible for any severance benefits. The memorandum further provided that DGS would pay vacation time owed to those DGS employees who became employed by Itek. Barry and Hanover accepted employment with Itek upon the takeover on March 23, 1979.

On July 11, 1979, the plaintiffs filed a complaint in the Superior Court and requested class certification. See Mass.R.Civ.P. 23, 365 Mass. 767 (1974). Barry alleged that DGS owed him and all other similarly situated former DGS employees for severance pay. Hanover alleged that DGS failed to compensate him and other similarly situated former DGS employees who did forgo, at DGS's request, taking vacation accrued prior to the date of the takeover by Itek. These obligations were based on an alleged contract under which DGS undertook to provide various benefits to its employees. DGS filed a memorandum in opposition to the motion for class certification in which it questioned the propriety of class certification. DGS requested the use of the test case approach, asserting that this approach was superior to class adjudication of this dispute. In ruling on class certification, the judge ordered that "the motion to certify is to be denied if the defendant files such a stipulation regarding liability and the

statute of limitations . . . . If it is not so filed, the Motion is to be allowed." DGS filed a stipulation, waiving the statute of limitations and agreeing to be bound by a determination of liability.[4]

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4. DGS's stipulation regarding test case procedures reads as follows: "Defendant herein, in response to an Order of the Court dated April 16, 1980, offers the following stipulations with regard to the 'test case' procedure:

"1. Statute of Limitations. If the test case procedure is adopted, the defendant agrees to waive any defense based on the Statute of Limitations as to any subsequent plaintiffs whose claim is based on the same factual circumstances as the present plaintiffs and whose claim was not already barred prior to the commencement of this action.

"2. Existence of a Contract. If the test case procedure is adopted, the defendant agrees to be bound by any decision of this Court regarding the existence of any express or implied contract to the extent that any subsequent plaintiff is able to prove the same factual elements of a contract which the present plaintiffs are required to prove. More particularly, if the present plaintiffs are required to prove individual detrimental reliance in order to establish the existence of a contract, the defendant does not stipulate that any other plaintiff has detrimentally relied on the defendant's offer to pay particular benefits absent proof of detrimental reliance by each subsequent plaintiff.

1. The propriety of the test case procedure. The defendants assert that the judge improperly conditioned the denial of class certification on DGS's filing of the stipulation regarding liability.[5] The defendants argue that class certification was improper in this instance and, therefore, the judge could not properly threaten class certification to force the defendants to relinquish their right not to be bound in any future cases. The defendants' argument rests

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4. (Continued)

> "3. Effect of a Contract. If a test case procedure is adopted, the defendant agrees to be bound by any decision of this Court regarding whether any contract deemed to exist between the test case parties requires the payment of benefits to the test case parties.
>
> "4. Appellate Rights. The defendant does not waive its right to appeal any decision of this Court regarding liability or damages."

5. On appeal, the defendants do not seek relief from that portion of the stipulation which concerns the statute of limitations.

on a fallacious premise that the judge forced them to choose between an improper class certification or the test case procedure. As the premise fails, so does the defendants' argument.

The defendants' position, faced with a request for class certification, was no different than any other similarly situated litigant. They could acquiesce in or oppose the certification. In opposing the class certification, the defendants chose, as a matter of tactics, to request the test case procedure. That was not their only choice. The defendants could have opposed certification solely on the basis that the dispute was not an appropriate class action.

We have approved the test case procedure as it is outlined in Katz v. Carte Blanche Corp., 496 F.2d 747, 758-762 (3d Cir.), cert. denied, 419 U.S. 885, 95 S.Ct. 152, 42 L.Ed.2d 125 (1974). Carpenter v. Suffolk Franklin Sav. Bank, 370 Mass 314, 322, 346 N.E.2d 892 (1976). A test case procedure only may be

used if requested by the defendant. Katz v. Carte Blanche Corp., supra at 762. A stipulation such as that filed by DGS is an appropriate and intrinsic element of the test case procedure. Id. at 760-761 & n. 7. DGS, having initiated the test case procedure by request, cannot claim that it was error for the judge to follow the procedure delineated in Katz. DGS made a tactical choice and must live by that choice. The order for a test case procedure which conditioned the denial of class certification on DGS's filing a stipulation regarding liability was not erroneous.

2. ERISA preemption. As a threshold issue, we address the plaintiffs' argument that the defendants may not raise the issue of ERISA preemption for the first time on appeal. The extent to which ERISA preempts the application of State law to employee benefit plans determines whether this issue is properly raised. In Tosti v. Ayik, 386 Mass. 721, 725, 437 N.E.2d 1062 (1982), quoting Litton Business Syss., Inc. v. Commissioner of

Revenue, 383 Mass. 619, 622, 420 N.E.2d 339 (1981), we stated that "[s]ubject matter jurisdiction may be raised for the first time on appeal as it 'cannot be conferred by consent, conduct or waiver.'" The jurisdictional issue in Tosti concerned the preemption of State libel law in the context of a labor dispute. "Federal labor law preempts State libel law to the extent that defamatory statements made in the context of a labor dispute are actionable only if made with knowledge of their falsity or with reckless disregard of the truth." Tosti, supra 386 Mass. at 723, 437 N.E.2d 1062, citing Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 273, 94 S.Ct. 2770, 2776, 41 L.Ed.2d 745 (1974), and Linn v. Plant Guard Workers Local 114, 383 U.S. 53, 61, 86 S.Ct. 657, 662, 15 L.Ed.2d 582 (1966). The application of State law to employee benefit plans is more extensively preempted under ERISA. The Supreme Court recently stated that in ERISA, "Congress

applied the principle of pre-emption 'in its broadest sense to foreclose any non-Federal regulation of employee benefit plans,' creating only very limited exceptions to pre-emption." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 103 S.Ct. 2890, 2903, 77 L.Ed.2d 490 (1983), quoting 120 Cong.Rec. 29197 (remarks of Rep. Dent). The exceptions to preemption appear in 29 U.S.C. §§ 1003 and 1144. Neither provision applies to this case.[6] ERISA preempts "any and all State laws insofar as they may . . . relate to any employee benefit plan." 29 U.S.C. § 1144(a). This is more

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6. Congress excepted certain specific types of plans from ERISA coverage. 29 U.S.C. § 1003(b). The exceptions do not apply in this case. ERISA specifically precludes preemption of "any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2). See Attorney Gen. v. Travelers Ins. Co., 391 Mass. 730, 463 N.E.2d 548, prob. juris. noted sub nom. Metropolitan Life Ins. Co. v. Massachusetts, -- U.S.--, 105 S.Ct. 320, 83 L.Ed.2d 258 (1984). The application of State principles of contract law clearly is not protected by 29 U.S.C. § 1144(b)(2).

extensive than the partial preemption of State libel law we faced in Tosti. We therefore conclude that the question whether ERISA preempts the application of State law to this dispute presents an issue of subject matter jurisdiction which may be raised for the first time on appeal. See Tosti, supra 386 Mass. at 725, 437 N.E.2d 1062.

That the defendants may raise the issue of preemption does not dispose of the issue. We must determine whether the particular employee benefits are granted pursuant to a plan within the purview of ERISA thereby precluding the application of State law.

a. Severance pay. There appears to be no doubt that the severance pay plan at issue falls within the scope of ERISA. The plaintiffs concede that the severance pay plan is an ERISA employee benefit plan. Various Federal courts have examined severance pay plans similar to that of DGS and determined that ERISA is applicable to such plans. See, e.g., Dhayer v. Weirton Steel Div. of Nat'l

Steel Corp., 571 F.Supp. 316, 329 (N.D.W.Va.), aff'd sub nom. Sutton v. Weirton Steel Div. of Nat'l Steel Corp., 724 F.2d 406 (4th Cir. 1983), cert. denied, --U.S.---, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984); Petrella v. NL Indus., Inc., 529 F.Supp. 1357, 1362 (D.N.J. 1982); Calhoun v. Falstaff Brewing Corp., 478 F.Supp. 357, 359 (E.D. Mo. 1979). That DGS may have failed to meet ERISA's reporting and disclosure requirements, 29 U.S.C §§ 1021-1031, and ERISA's fiduciary standards, 29 U.S.C. §§ 1101-1114, does not preclude ERISA coverage of this severance pay plan. Blau v. Del Monte Corp., 748 F.2d 1348, 1352 (9th Cir. 1984). "[I]t would be incongruous for persons establishing or maintaining informal or unwritten employee benefit plans, or assuming the responsibility of safeguarding plan assets, to circumvent the Act merely because an administrator or other fiduciary failed to satisfy reporting or fiduciary standards." Donovan v. Dillingham, 688 F.2d 1367, 1372 (11th Cir. 1982). We conclude that the

severance pay plan of DGS is an employee benefit plan within the purview of ERISA. The judge's application of State law to a determination of the right to severance pay therefore was preempted.

b. Vacation pay. The issue whether the vacation pay plan of DGS falls within the scope of ERISA presents a more difficult question. Section 1002(1) of 29 U.S.C defines any employer-established program which provides vacation benefits as an employee welfare benefit plan. Such plans, unless specifically exempted, appear to be covered by ERISA. 29 U.S.C. §§ 1002(1), 1002(3), and 1003. A United States Department of Labor regulation, however, states that payments of compensation out of an employer's general assets while an employee is on vacation are not made pursuant to an employee welfare benefit plan. 29 C.F.R. § 2510.3-1(b)(3) (1984). In California Hosp. Ass'n v. Henning, 569 F.Supp. 1544, 1546 (C.D.Cal.1983), that court, faced with this apparent conflict, concluded that, "[i]f that

regulation does indeed intend ERISA exemption of every unfunded vacation program, it is at clear odds with language of the statute itself and an invalid arrogation of power by the Department."[7] The United States District Court for the Northern District of Illinois adopted the opposite view and concluded that a vacation pay plan found in a collective bargaining agreement does not fall within the

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7. The court spoke approvingly of those plaintiffs' narrow interpretation of the regulation. That interpretation would limit the regulation's application to "those situations where there is an employer's discretionary 'practice' rather than a plan or program to which the employer is committed, by contract or otherwise." California Hosp. Ass'n v. Henning, supra at 1546. This interpretation reasonably resolves the apparent conflict between the regulation and the statute. Furthermore, it is supported by the heading in that portion of the regulation which indicates that the regulation applies to "payroll practices." 29 C.F.R. § 2510.3-1(b). The court did not find it necessary to adopt the plaintiffs' view because it concluded that, if the regulation exempted the plans at issue in that case, it would improperly conflict with the statute. California Hosp. Ass'n, supra.

ERISA provisions. National Metalcrafters, a Div. of Keystone Consol. Indus. v. McNeil, 602 F.Supp. 232 (N.D.Ill.1985). We are persuaded by the well-reasoned analysis in California Hosp. Ass'n v. Henning, supra.

In National Metalcrafters, the court's analysis is based on certain misconceptions of ERISA. The court surmised that an employee benefit plan which does not comply with the fiduciary responsibility requirements of ERISA, 29 U.S.C. §§ 1101-1114, is not the type of plan that is subject to ERISA. National Metalcrafters, supra at 236-237. The court also relied on 29 U.S.C. § 1143(a)(1) for the conclusion that certain plans are not subject to ERISA. Id. at 236. This provision, however, does not relate to the scope of ERISA. Rather, it provides the Secretary of the Department of Labor with the authority "to study the need for expanding coverage of this Act to those plans which are not made subject to this Act." S.Rep.No. 127, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. §

Ad.News 4639, 4838, 4855. This reliance on 29 U.S.C. § 1143(a)(1) ignores the Supreme Court's declaration that there are only "narrow, specific exceptions" to preemption of State regulation related to employee benefit plans. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 103 S.Ct. 2890, 2903, 77 L.Ed.2d 490 (1983).

The basis of the National Metalcrafters result was properly discredited in Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982). The court noted that neither the definition of an employee benefit plan, 29 U.S.C. §§ 1002(1) and 1002(3), nor the coverage section of ERISA, 29 U.S.C. § 1003, requires a formal, written plan. The court concluded that, "[o]nce it is determined that ERISA covers a plan, the Act's fiduciary and reporting provisions do require the plan to be established pursuant to a written instrument . . . but clearly these are only the responsibilities of administrators and fiduciaries of plans covered by ERISA and are not prerequi-

sites to coverage under the Act." Donovan, supra at 1372. Accord Blau v. Del Monte Corp., 748 F.2d 1348, 1352 (9th Cir. 1984).

The United States District Court for the Central District of California relied on the analysis in Donovan to reach its conclusion that vacation plans, such as that used by DGS, are employee benefit plans covered by ERISA. California Hosp. Ass'n, supra at 1546. This Court agrees with the narrow interpretation of 29 C.F.R. § 2510.3-1(b), approved in California Hosp. Ass'n, supra. See note 7 supra. We conclude that the vacation plan of DGS is an employee benefit plan covered by ERISA. To do otherwise would cause the incongruous result of allowing an employer to avoid the broad scope of ERISA coverage by adopting a plan which ignores the fiduciary responsibilities required under ERISA. Donovan, supra at 1372. Accordingly, State law may not determine whether the defendants owed the plaintiffs for vacation pay.

3. Application of the ERISA standard. Under ERISA, a determination whether an employer improperly denied benefits allegedly due an employee requires the application of an "arbitrary and capricious" standard. See, e.g., Griffis v. Delta Family-Care Disability & Survivorship Plan, 723 F.2d 822, 825 (11th Cir. 1984), cert. denied, --U.S.--, 104 S.Ct. 3514, 82 L.Ed.2d 823 (1984). See also Malhiot v. Southern Cal. Retail Clerks Union, 735 F.2d 1133, 1135 (9th Cir. 1984), cert. denied sub nom. Jampol v. Southern Cal. Retail Clerks Union, --U.S.--, 105 S.Ct. 959, 83 L.Ed.2d 965 (1985). An individual with discretionary authority or responsibility in the administration of the employee benefit plan is a fiduciary for ERISA purposes. 29 U.S.C. § 1002(21)(A). An ERISA fiduciary must interpret the plan "solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses

of administering the plan." 29 U.S.C. § 1004(a)(1)(A). See Palino v. Casey, 664 F.2d 854, 858 (1st Cir. 1981). ERISA also requires that an administrator of an employee benefit plan fulfil certain responsibilities. See, e.g., 29 U.S.C. § 1021. Under the definition in ERISA, the individuals at DGS who were responsible for interpreting the benefits described in the manual are both the fiduciaries and the administrators of the employee benefit plan. 29 U.S.C. §§ 1002(16), 1002(21)(A). See Blau v. Del Monte Corp., 748 F.2d 1348, 1352 (9th Cir. 1984). The propriety of DGS's denial of benefits allegedly due the plaintiffs must be determined by applying the ERISA standards to the fiduciaries' actions.

The plaintiffs pursued and the defendants opposed this action on the basis of State contract law not applicable to this ERISA plan. The defendants did not raise any ERISA issues until they filed a supplemental brief

one month before oral argument to this court.[8] Neither the Superior Court judge nor the parties had an opportunity to examine this dispute or to develop a record based on the applicable ERISA standard. In reviewing the applicable standard, we conclude that the record is not sufficiently developed to allow us to determine accurately whether the defendants' action in denying the requested benefits was arbitrary and capricious. In fairness to both parties, therefore, we remand this matter to the Superior Court for further hearing and the application of the ERISA standard. See Tosti v. Ayik, 386 Mass. 721, 725, 437 N.E.2d 1062 (1982).

In order to provide the judge with guidance, we briefly review the factors relevant to a determination whether the defendants improperly denied benefits allegedly

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8. We acknowledge the filing of an amicus brief by the New England Legal Foundation, which further clarified the ERISA issues.

due the plaintiffs. The judge should examine the language of the benefit plan as exhibited in the employee handbook and the manual. That language and the prior practice of DGS will be factors in determining to what degree a decision to award a particular benefit was mandatory or discretionary. See Petrella v. NL Indus, Inc., 529 F.Supp. 1357, 1362 (D.N.J. 1982) (although severance plan couched in discretionary terms, defendants' administration of the severance pay plan may have entitled plaintiffs to benefits. The absence of or limitations on discretion would affect the defendants' ability to deny the plaintiffs any benefits. Cf. Pinto v. Zenith Radio Corp., 480 F.Supp. 361, 363-364 (N.D.Ill. 1979), aff'd, 618 F.2d 110 (7th Cir. 1980) (decision to deny severance pay not arbitrary and capricious where plan stated severance pay was not automatic and was to be determined on a case by case basis). The judge should give deference to a reasonable interpretation of

the plan. If the defendants, however, "impose[d] a standard not required by the plan's provisions, or interpret[ed] the plan in a manner inconsistent with its plain words, or by their interpretation render[ed] some provisions of the plan superfluous, their actions may well be found to be arbitrary and capricious." Miles v. New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan, 698 F.2d 593, 599 (2d Cir.), cert. denied, -- U.S. --, 104 S.Ct. 105, 78 L.Ed.2d 108 (1983). The judge's determination should be influenced by whether the defendants failed to comply with ERISA, Blau v. Del Monte Corp., supra at 1353-1356, and whether the defendants' changes in the eligibility for benefits were made and notice given to employees subject to the limits of fundamental fairness, Palino v. Casey, supra at 859. The propriety of the defendants' interpretation of the plan should be determined considering the relevant factors regarding their duty to interpret the plan "solely

in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1). The court, therefore, should inquire into the defendants' reason for changes in eligibility for the benefits.

For the foregoing reasons, we vacate the judgment of the Superior Court and remand this matter for further action consistent with this opinion.

So ordered.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles. I am over the age of eighteen years and not a party to the within action. My business address is One Wilshire Boulevard, Suite 2100, Los Angeles, California, 90017. On this date, April 7, 1986, I served the within PETITION FOR WRIT OF CERTIORARI in the matter styled "California Hospital Association, et al. v. Patrick W. Henning" in the United States Supreme Court, October Term, 1985, on all other parties to said action by placing 3 true copies thereof enclosed in a sealed envelope with first class postage prepaid. in the United States post office mail box at Los Angeles, California, addressed as follows:

John M. Rea, Esq.,
Attorney for the Labor Commissioner
525 Golden Gate Avenue
Suite 606
San Francisco, CA 94102

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on April 7, 1986 at Los Angeles, California.

CATHERINE BELLOMO
Catherine Bellomo

FILED
MAY 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1648

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CALIFORNIA HOSPITAL ASSOCIATION, a non-profit California corporation; CALIFORNIA RESTAURANT ASSOCIATION, a non-profit California corporation; CALIFORNIA MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA HOTEL AND MOTEL ASSOCIATION, a non-profit California Corporation,

Petitioners,

v.

PATRICK W. HENNING, as Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENT LABOR COMMISSIONER

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly found that the Secretary of Labor had authority granted by 29 U.S.C. § 1135 to interpret the statute and define technical terms, such as "employee welfare benefit plan" as distinct from "payroll practices", in regulations which clarify terms in the definitions section of Title I of the Employee Retirement Income Security Act (ERISA).

2. Whether the Court of Appeals was correct in holding that the Secretary of Labor's interpretation of the statute and coverage definitions by rulemaking was reasonable and permissible when it excluded from ERISA's definition of "employee welfare benefit plan" traditional arrangements for vacations by which employees continue to receive their regular pay from the business' general assets while enjoying leave from the workplace.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1648

CALIFORNIA HOSPITAL ASSOCIATION, a non-profit California corporation; CALIFORNIA RESTAURANT ASSOCIATION, a non-profit California corporation; CALIFORNIA MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA HOTEL AND MOTEL ASSOCIATION, a non-profit California Corporation,

Petitioners,

v.

PATRICK W. HENNING, as Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENT LABOR COMMISSIONER

Respondent, PATRICK W. HENNING, and his successor as Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California, Defendant in the District Court and

Respondent in this Court, submits that Plaintiffs' petition for a writ of certiorari should be denied and files this brief in opposition to the petition.

SUPPLEMENTAL STATUTORY AUTHORITY

Section 505 of ERISA provides:

> [T]he Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter. Among other things, such regulations *may define accounting, technical and trade terms* used in such provisions . . . . (emphasis added)

29 U.S.C. § 1135.

SUPPLEMENTAL STATEMENT OF THE CASE

Because the Petition's legal theories take scant notice of the definitional regulation, and the Secretary's authority to promulgate it, the statement of the case ignores the genesis of the exclusion of ordinary vacations from ERISA. The cause of the definition, which resulted in the Petitioner's unhappiness, is the uncertainty engendered by the way the Congress chose to articulate coverage in 1974. Congress passed the Employee Retirement Income Security Act (ERISA) to safeguard employee interests in pensions, and to a lesser extent, welfare benefits, which are provided by what ERISA calls "employee benefit plans." 29 U.S.C. §§ 1003(a), 1002(3). ERISA did not safeguard benefits by setting minimum levels which all employers and unions must provide, in whatever way they choose. Rather, *if* benefits were provided then ERISA required that the "plan" doing so meet certain minimum standards. Plans providing pensions were more severely regulated than those providing welfare benefits. Coverage questions thus focus on what is a plan-providing-benefits covered by ERISA rather than merely what is a "benefit" provided under ERISA.

ERISA protection of employee interests in "welfare benefits" does not come without cost. As Judge Posner summarized [1] in deciding not to resolve whether ERISA covered ordinary vacations, a decision for coverage:

> "would subject all companies with vacation plans to the elaborate requirements that ERISA imposes on plans within its scope, would broadly displace the regulation of vacation benefits by states, and could bring a host of trivial cases into the federal courts."
>
> *National Metalcrafters v. McNeil*, 784 F.2d 817, 823 (7th Cir. 1986)

Such consequencse heigntened interest in the definitions of used for coverage once ERISA was passed in 1974. ERISA had given the technical term "benefit" no generally applicable meaning for all situations, and "plan" was defined recursively.[2] Terms like "vacation benefit" were neither defined nor came from the predecssor statute [3] with a meaning. For example, an arrangement for

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[1] "Employee benefit plans" must meet certain uniform standards. Under 29 U.S.C. § 1002(2)(A) and (2)(B) they must have a written instrument, designated fiduciaries, and a funding policy. Under § 1103(a), (b) and (c) any assets must be held in trust. Sections 1104-13 require fiduciary conduct in the administration of benefits and funds. Under § 1133 there must be a claims procedure with written notice of benefit denials, and opportunity to appeal same. All violations may and some must be remedied in federal court, 29 U.S.C. § 1132(a)(1)(B) and (e)(1), spurred by the possibility of awards of attorneys fees, § 1132(g).

[2] To distinguish an "employee welfare benefit plan" or "welfare plan" from a pension plan, it is defined as a "plan, fund or program . . . established or maintained . . . for the purpose of providing . . . (A) medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or *vacation benefits*, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services or (B) any benefit described in [the Taft-Hartley Act] section 186(c) of this title . . . . 29 U.S.C. § 1002(1). (Emphasis added).

[3] The Welfare and Pension Plan Disclosure Act, 72 Stat. 997, 29 U.S.C. § 301 *et seq.* (1976 ed.)

what both parties here concede are "employee welfare benefit plans" which provide "vacation benefits" [4] existed at the time of the Act. The common usage of "vacation" was then, and is now, a leave enjoyed while on the payroll of a one's constant employer.[5]

The resulting uncertainty as to the meaning of "employee welfare benefit plan" in ERISA's definition section led to "numerous inquiries" after the enactment of ERISA. 40 Fed. Reg. 24,642, 2d col. (June 9, 1975). In response, the Secretary used his regulatory authority, which included specific authority to define "technical and trade terms used in such provisions." 29 U.S.C. § 1135. The result was the regulation upheld here, entered in the Code of Federal Regulations under the heading "Definitions of Terms Used In Subchapters . . . § 2510.3-1 Employee Welfare Benefit Plans."

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[4] For example, a funded arrangement for vacations has been described as similar to pensions in that it "provid[ed] accumulated money to a worker for future beneficial use . . .", *Franchise Tax Board v. Construction Laborers' Vacation Trust*, 679 F.2d 1307, 1309 (9th Cir. 1982), *rev'd on juris. grounds*, 103 S. Ct. 2841 (1983). These funded programs exist because members typically work for several employers during the course of a year. 103 S. Ct. at 2844 n.2. Such arrangements are common where a union has organized among many small employers, as in construction and longshore work. Both the trust aspect, and the fact that what the employee is paid is not compensation from any single employer, make such plan a "welfare benefit plan." If the fund did not hold individual accounts in trust, 679 F.2d at 1308-09, but "pooled" them then it also would be covered by the literal language of the cross-reference to 29 U.S.C. § 186(c) for "pooled vacation" arrangements.

[5] Someone on salary at $24,000 per year with two weeks vacation is not said to make a salary of $23,000 with a $1,000 vacation benefit. Nor would a more senior co-worker at the same pay level, who is entitled to month off, be said to make a salary of $22,000 but a vacation "benefit" of $2,000. The senior employee is just said to have a longer vacation (i.e. leave).

In December 1974, the Secretary announced that clarifying regulations would distinguish employers' practices associated with "regular compensation," such as overtime pay, vacation pay, and jury duty pay which "will not subject the employer to any filing or disclosure duties under the Act." 39 Fed. Reg. 42,236 (first col.), December 4, 1974. The regulations which the Secretary proposed six months later distinguished wage arrangements, called "payroll practices", from "welfare benefit plans." 40 Fed. Reg. 24,642-43 (June 9, 1975). Among those asking further clarification were sixty major corporations speaking as the ERISA Regulatory Industry Committee. The Committee proposed to the Secretary a "general rule" which would define an "employee welfare benefit plan" by funding source—i.e., disregarding what specified in § 1002(1)(A) was being provided. (App. K [6] at K-5). The Committee's suggestion was that, if the arrangement providing it were unfunded, uninsured and paid from general assets then it should not be a "welfare benefit plan." (App. K at K-2). As an alternative to such a general rule, the Committee proposed that the definitions of what practices and arrangements were not "plans" be broadened considerably to exclude items which were arguably covered because listed in § 1002(1)(A), but were not truly within Congress' intention. (App. K at K-2; listing at K-3-7). When the Secretary issued final regulations no general definition tied to funding had been adopted. Instead, what was a "welfare benefit plan" had been defined for each element of § 1002(1)(A) which can potentially be the object of an ERISA "plan." Defined as "payroll practices" were vacations and holidays paid out of general assets. 40 Fed. Reg. 34,526, August 15, 1975 and 29 C.F.R. § 2510.3-1(b)(3) (Pet. at 13). Arrangements to provide employees with other items listed in § 1002(1)(A) which were not associated with

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[6] Petitioner's extensive appendices run from A to J, so to avoid confusion, K is Respondent's first.

wages, or were triggered by contingencies such as ill health, were defined as "welfare benefit plans" even if paid from general assets. In making such distinctions, the Secretary said he also considered Congress' purpose in enacting ERISA to cure certain abuses. 40 Fed. Reg. 24,642-3.

REASONS NOT TO GRANT THE WRIT

I.

This decision on vacation pay, like the decisions on severance pay, *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140, 1145 (4th Cir. 1985), *appeal and pet. for cert. filed*, 54 U.S.L.W. 3412 (1985) and *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320, 325 (2d Cir. 1985) appeals filed 54 U.S.L.W. 317d (1985) find that to answer the ERISA coverage question one must decide the legal propriety of the Secretary's regulation defining "employee welfare benefit plan." (770 F.2d at 858, App. B at B-4). The Petition puts the question as if Congress had not granted rulemaking and definitional power in 29 U.S.C. § 1135, and instead had asked courts to construe ERISA's definitional sections *de novo*. See Pet. at 1. However, even the District Court acknowledged the nature of the question in its one-sentence dismissal of the Secretary's authority and regulation. (569 F.Supp. 1544 at 1546, App. C at C-8). Under well-established principles the appropriate standard of review is far less stringent than *de novo* review of a circuit's statutory construction.

The Secretary's definitional regulation must meet the standard of being "reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes, Inc.*, —— U.S. ——, 106 S.Ct. 455, 461 (1985). *Bayview Homes* rejected an attack on the Corps of Engineers regulatory construction of "navigable waters" and "waters of the United States" to in-

clude not only navigable waters, but also swamps, marshes and bogs adjacent to navigable waters. The regulatory definition was "reasonable" given the Corps technical expertise, the inherent difficulties of defining precise boundaries of water and land, and that the Corps paid heed to Congressional policies behind the Clean Water Act. Here, the formal rulemaking process leading to the Secretary's definitional regulation likewise addressed coverage of ERISA, was based on the Secretary's expertise in compensation matters which encompasses both wages and benefits, and this segment of the definition was expressly based on the Congress' purposes in passing the Act. The Petition does not pretend to show from legislative history that Congress expressed any contrary intent, since no party or court has found any legislative history of any kind on vacation arrangements. Thus the only question before this Court, as it was before the Ninth Circuit, is whether Petitioner can show that the definitional regulation was not reasonable.

It was reasonable for the Secretary to propose a distinction between employee welfare benefit plans and "payroll practices" as to those items in § 1002(1)(A), such as extra pay, sick pay, vacation and jury leave on full pay, which resemble wages and for which Congress has specified a very different regulatory regime under the Fair Labor Standards Act. 29 U.S.C. §§ 202, 218. That reasonableness is not undermined if other elements listed in § 1002(1)(A) which employees are eligible for only upon unforeseen circumstances—e.g., death benefits, severance pay—or which are not wage-like—e.g., medical care, apprenticeship—are not addressed there. The Petition rests its case for unreasonableness (and its later discoveries of conflicts with cases[7] on disability leave,

[7] The District Court cases do not present conflicts within the meaning of Rule 17.1, and so are not discussed. They are unhelpful in discovering the importance of this question because vacation pay is usually a subsidiary question, and often it is not clear whether the vacation arrangement was funded or not.

sick pay and severance pay) on the following characterization of this decision:

> "In finding this regulation to be dispositive of the case, the Ninth Circuit concluded that ERISA's coverage of vacation benefit plans or programs depends *solely* on whether the vacation benefits are financed through a trust fund or through the employer's general assets. Pet. at 24; (Emphasis in original).

However, the Ninth Circuit characterized the line which the Secretary had drawn as "in terms of the *occasion* for payment, the *circumstances* in which it was made, *and* the *source*" (770 F.2d at 860; App. B at B-8.) (Emphasis supplied.) "[T]he funded/unfunded distinction alone" was not the basis (770 F.2d at 863; App. B. at B-18.)

The Petition simply ignores the "occasion/circumstances/source" three-part test.[8]

The three-part nature of the definition is reasonable because it allows the Secretary to better conform to Congress' purposes in passing ERISA. The three elements allow coverage definitions to address the multiple evils which Congress sought to cure. Some evils had to do with the uncertainty of receipt, and others with trustee self-dealing with assets.[9]

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[8] To show "unreasonableness" of a three-part test is much more difficult. It would require a demonstration that some other element in § 1002(1)(A) is furnished to employees under substantially the same "circumstances" and "occasion" as vacation pay, with general assets as it's "source"—and that the Secretary or controlling authority have defined it as an "employee welfare benefit plan." The information for such a demonstration is in the record, for the specific "circumstances" and "occasion" as well as "sources" were laid out in the Secretary's extensive discussion throughout the final rulemaking process. *See, e.g.*, 40 Fed. Reg. 34526-7 (Aug. 15, 1975). The Petition does not even attempt to find such a true contradiction.

[9] As noted at n.3, 770 F.2d at 861; App. B at B-7. In the legislative history cited in n.3, approximately half the plans criticized were welfare benefit rather than pension plans.

The Secretary's consideration of the source of funds as one element in defining "employee welfare benefit plan" is not made unreasonable because now, over a decade after the regulation has served as the settled interpretation of the statute, the Petition suggests that it could easily be evaded by creating a one-dollar trust to act as a conduit for general asset funding in order to make ordinary vacation arrangements an ERISA plan. If such ill-designed attempts [10] appear, the Secretary and the Courts will handle them appropriately.

II.

There is no conflict with decisions of this Court cited by the Petition because none address the coverage issue in this case. Those decisions of other circuits which address coverage support the result here.

The Petition argues that "the Ninth Circuit's general asset distinction is refuted" because of "implicit" or "implied" holdings that ERISA covers all general asset-funded arrangements to pay various medical and disability benefits, *Shaw v. Delta Airlines, Inc.*, 463 U.S.

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[10] Nowhere in the record or the cases cited do such hollow trusts appear. Nothing suggests that when the regulation defines ordinary vacations as those paid "out of general assets" that would not include those where the general assets are passed through a conduit by an agent of the employer, or paid by the employer who "later simply seek[s] reimbursement from the [single-dollar] trust." (Pet. at 26) The assertion that the hollow trust can be established "overnight and funded with *one dollar* without offending any ERISA requirement" (Pet. at 26) is unsupported by caselaw. It clearly raises questions of fiduciary duty if the employer as trustee promises annual vacations to the whole workforce while setting his segregated asset level at one dollar. There is obvious prospective liability for a fiduciary (and the fudiciary's surety) if the employer's stream of general assets are interrupted. Such ingenious criticism based on a hypothetical is like impuning the competence of the superintendent of the Washington zoo because his current taxonomy would fail to clearly consign Pegasus to the aviary or mammal sections.

85, 103 S.Ct. 2890, 2895 (1983), or salary continuation plans during disability, *Russell v. Massachusetts Life Insurance Co.*, —— U.S. ——, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985). Pet. at 29-31. But neither case involved vacation arrangements or the regulations at issue here.

In *Russell* the only question considered was whether a fiduciary plan may be held personally liable for extra-contractual compensatory or punitive damages caused by improper or untimely processing of benefit claims. Both parties had acknowledged in the Ninth Circuit that these were benefits provided by a covered plan. 772 F.2d at 485. Respondent Russell had not filed a cross-petition, and therefore did not question the Court of Appeals holding that her state law causes of action were preempted because the defendant was an employee welfare benefit plan under ERISA, 104 S.Ct. at 3088. In *Shaw*, the sole question considered by this Court was whether certain state discrimination laws were preempted by ERISA. 103 S.Ct. at 2895. The opinion never discussed whether the occasion for payment, the circumstances or the source of funding was the key to ERISA coverage. *Shaw* noted that the employer provided the employees with "various medical and disability benefits through welfare plans subject to ERISA," *Id.*, which assumes but does not decide coverage.

Gilbert v. Burlington Industries Inc., 765 F.2d 320 (2nd Cir. 1985), *appeals filed*, 54 U.S.L.W. 3179 (1985) and *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985), *appeal and pet. for cert. filed*, 54 U.S.L.W. 34122 (1985), far from presenting a conflict, support the Ninth Circuit's conclusion here. Both cases uphold the definitional regulations issued by the Secretary defining coverage, although on a different issue. In both cases, plaintiffs sought the opposite result from this Petition—i.e., that state law was *not* preempted—but based their argument on the same legal theory. Plaintiffs ar-

gued that the "funded/unfunded" source distinction was the *only* proper indicator of coverage, and attacked the Secretary's definition which specified that unfunded severence pay arrangements are employee welfare benefit plans. Plaintiffs said that this difference was not reasonable since vacation pay, when funded from general assets, was not a covered plan. *Gilbert* and *Holland* rejected plaintiffs' premise that *only* the source of payments counts in the definition of an employee welfare benefit plan, following the Ninth Circuit in *Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985). *Gilbert* and *Holland* look instead to the occasions and circumstances in which severence pay is due. *Gilbert*, 765 F.2d at 326; *Holland*, 772 F.2d at 1146. Both cases [11] hold unfunded severence benefits to be ERISA covered plans, contrasting vacation pay as appropriately categorized as a "payroll practice." *Id.*

In short, by rejecting the "funding only" attack and upholding the Secretary's definitional regulations on another question, *Gilbert* and *Holland* support, rather than conflict with, this decision.[12]

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[11] Additionally, *Gilbert* and *Holland*, following *Scott*, agree with the Secretary that ERISA's cross-reference to the Taft-Hartley plans does not limit ERISA coverage to "pooled trusts" which provide severence benefits described in 29 U.S.C. § 186(c). This holding that the cross-reference means that certain arrangements other than trusts *can* be provided by a plan covered by ERISA does not logically include a holding that everything not provided by a trust *must* be a covered plan.

[12] The argument that this decision deserves certiorari because of some judicial economy to be gained if the petitions in *Holland* and *Gilbert* are granted as well does not survive a brief look at the questions which those petitioners/appellants present. Should both cases be reversed on the merits, then the decision here would merely have held correctly—that vacation pay is a payroll practice not covered by ERISA—for the wrong reason—reliance on the Secretary's rule making authority. The basic reason that there would be no overlap of issues, beyond the procedural history of the regulations and their rationales, would be the numerous differences between

Blakeman v. Mead Containers, 779 F.2d 1146 (6th Cir. 1985), is not to the contrary because the language the Petition quotes is not a holding on coverage, but an observation that the parties conceded the issue. *Blakeman* affirms judgment for the employer on the basis that claims for vacation pay based on state law cannot be made when ERISA covers the arrangement for providing vacations. But the opening lines of the decision note that plaintiffs sued on 29 U.S.C. § 1132, ERISA's jurisdiction section, *as well as* asserting state law claims. 779 F.2d at 1147. Plaintiffs sought "the penalty provided by 29 U.S.C. § 1132(c), attorney fees and costs" for "vacation pay" and "violation of the vacation pay plan." 779 F.2d at 1148; see also at 1149. All of these claims are available only when plaintiff asserts that vacations *are* an employee welfare benefit plan, so as to make the defendant a "fiduciary" or "plan." Thus *Blakeman* did not decide the issue in this case, whether ERISA covers ordinary vacation pay; it simply accepted the parties assumptions that it did, and based on them [13] held state claims

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severance pay and vacation pay (and, perforce, California's anti-forfeiture rule regarding vacations) once the merits were reached. Vacations are modest amounts of leave earned by most of the work force, drawn on at intervals throughout the year, usually voluntarily. Severance pay comes all at once for much of the work force and can be in very substantial amounts (i.e., "golden parachutes"). Severance pay protects against an unexpected catastrophe. Vacations are such routine matters that the payroll department handles them, knowing that predictable amounts of annual leave will accrue and the payment will be due when leave is taken. The unpredictable and highly contingent nature of severance pay—which is shared with sick leave, death benefits, etc.—is reflected in common speech which never confuses it with wages. One speaks of an unfortunate friend's "unemployment benefits" and "severance benefits" but not a lucky friend's "vacation benefits."

[13] Thus when *Blakeman* says that "there was little doubt that" everything sought by plaintiffs was from an "employee welfare benefit plan" and cites to 29 U.S.C. § 1002(1) in a footnote, this records *both* parties joint position rather than makes a holding. The "but see" citation to this case, on which a conflict is asserted,

preempted. If *Blakeman* had discussed, confronted and adjudicated the validity of the Secretary's regulation, certainly it would have referenced its own opinion (cited by the Ninth Circuit) which gives the same regulation "great deference." *Abella v. W. A. Foote Memorial Hospital, Inc.*, 740 F.2d 4, 5 (6th Cir. 1984) (per curiam). *Abella* relied on the "payroll practices" regulation to find that an employee could not sue under ERISA for sick leave paid out of general assets.

III.

This decision's one conflict with an interlocutory decision of a state supreme court does not require the grant of a writ because there is no final judgment, and any conflict may otherwise be resolved. *Barry v. Dymo Graphics Systems, Inc.*, 394 Mass. 830, 478 N.E.2d 707 (1985) (App. J) rejects the Secretary's regulation and follows the opinion of the district court below, then remands "for further hearing and the application of the ERISA standard." (App. J at J-22) The remand advised the lower court to decide whether the provisions of the plans were arbitrary and capricious, including consideration whether defendants failed to comply with ERISA's minimum standards, and had interpreted the plan provisions with the proper consideration of the interests of the beneficiaries as required by 29 U.S.C. § 1104(a)(1).

The Petition neither acknowledges that the decision is not final, nor argues that it fits within one of the exceptions in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 Sup. Ct. 1029 (1975). An obstacle of use of any exception would be two tests in *Flynt v. State of Ohio*, 451 U.S. 617, 101 S. Ct. 1958, 1960 (1981). First, the remand for trial under ERISA standards means that other federal law issues will certainly arise between now

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is a reference rather than a rejection. It is better read as an instruction to future litigants not to assume ERISA coverage, as the parties there did before this Ninth Circuit decision.

and final judgment. Second, the holding is not one which a state court is insensitive to an interest whose protection is the special charge of federal courts, but the opposite, over-expansion of federal law. *Compare Belknap, Inc. v. Hale*, —— U.S. ——, 103 S.Ct. 3172, n.5 at 3176 (1983).

One basic fact suggests that this case is not worthy of an exception to the finality rule—the citizens of Massachusetts are unlikely to long toil under an aberrational rule. A series of factors make reversal or reconsideration a likely end to the conflict without granting a writ. The Ninth, Sixth, Fourth and Second Circuits have upheld the validity of the Secretary's definitional regulations generally, and specifically endorsed the "payroll practice" distinction. Massachusetts noted that it had been forced to rule in a peculiar procedural posture—the first presentation of the issue was via defendant's supplemental brief one month before oral argument. (394 Mass. at ——; App. J. at J-21, 22). Thus there were no intermediate state appellate decisions supporting the conclusion, so the state's highest court to rule was also it's first.[14] The plaintiffs, after trial below [15], are free to seek reconsideration or, failing that, certiorari. Plaintiffs' case for gaining review will be somewhat strengthened by a denial of certiorari on this decision, reversing the authority which *Dymo* relies upon. The First Circuit will almost certainly reach the issue [16], either because plaintiffs will sue in federal courts relying on *Dymo*, or an

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[14] The court was further handicapped by having presented to it only two decisions interpreting this unfamiliar federal statute, neither extensively reasoned, and both subsequently reversed. One was the district court here; the other *National Metalcrafters v. McNeill*, 602 F. Supp. 232 (N.D. Ill. 1985), rev'd on other grounds, 784 F.2d 817 (7th Cir. 1986).

[15] We ask judicial notice of the pendency of trial proceedings after remand in the Suffolk Superior Court in Boston, docket No. 79-3666.

[16] No state law says that the Massachusetts Supreme Court may not chose to defer to a federal appellate court, and the treatment of the district court opinions interpreting the federal statute make that likely.

employer who is sued for default on ERISA's requirements will seek to escape the *Dymo* precedent by removal. *Shaw, supra*, 103 S. Ct. at 2899 n.14.

Not only is *Dymo* unlikely to permanently affix a different rule to one state, but it is unlikely to spread such a rule to other states during the interim. It's main authority has been removed by the Ninth Circuit. A similar argument has failed elsewhere.[17] From the Secretary's 1975 rulemaking until the district court opinion below, few litigants showed an interest in challenging this long-accepted distinction. The state and district court cases arose from the confusion engendered by the novel district court opinion in this case. The Ninth Circuit's thoroughly-explained reversal should end whatever temporary confusion has arisen among state courts and lower federal district courts.

CONCLUSION

For the foregoing reasons, a writ of certiorari should not issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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DATED: May 28, 1986

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[17] The Kansas courts have refused to strike a Kansas statute similar to California's, in response to an *amicus* brief by that state's hospital association, in reliance on the definition of vacation pay from general assets as outside the scope of an employee welfare benefit plan. *Richardson v. St. Mary's Hospital*, 267 P.2d 1143, 1146, 6 Kan. App.2d 239 (1981).

APPENDIX K

Excerpts of Comments Submitted on Behalf of the ERISA Regulations Industry Committee (ERIC) in Response to the Notice of Proposed Rulemaking Published in the Federal Register of June 9, 1975

APPENDIX K

VEDDER, PRICE, KAUFMAN, KAMMHOLZ & DAY
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

202 298-6445

July 8, 1975

Office of Employee Benefits Security
Labor Management Services Administration
U.S. Department of Labor
200 Constituiton Avenue, N.W.
Washington, D.C. 20216

Re: Notice of Proposed Rulemaking Concerning Reporting and Disclosure Under The Employee Retirement Income Security Act of 1974; 40 FR 24621, June 9, 1975.

Dear Sir:

These comments regarding the proposed regulations on reporting and disclosure under ERISA are submitted on behalf of the ERISA Regulations Industry Committee (ERIC), an ad hoc industry group composed of sixty major corporations, each of which maintains one or more plans affected by the notice of proposed rulemaking published in the Federal Register of June 9, 1975. For convenience, these comments, which reflect the consolidated views of ERIC members, have generally been arranged in the order of the proposed regulations and not necessarily in the order of their importance.

* * * *

EXCERPT

* * * *

Section 2510.3-3 *Employee Benefit Plans*

2. General Comment On Excluded Practices and Arrangements

We concur with the rationale found in the proposed regulation for not listing all possible plans, practices or arrangements that are not intended to be covered by the reporting and disclosure provisions of Title I of the Act.

However, the term "employee welfare benefit plan," as defined in Section 2(1), should not includes the type of benefits outlined in Section 3(1) if such benefits are unfunded, uninsured and are paid from the general assets of the employer. This suggested generalized rule is consistent with the intention of Congress and within the authority of the Secretary of Labor under Section 505 of the Act, and will be more workable than the use of a long list of exclusions which will be subject to continuous modification and varying interpretations.

However, it is imperative if such a generalized rule of exclusion is not adopted, that the listing of excluded practices or arrangements be broadened considerably to include more of the plans, practices and arrangements that clearly were not intended by the Congress to be covered by the Act. An unreasonable interpretation in this critical section of the regulation can turn an Act intended to provide in part meaningful and constructively useful information to participants into a costly, burdensome, administrative nightmare for plan sponsors in communicating a host of details to participants which will be of little real value to them.

Alternatively, we offer the following comments and additions to those plans, practices and arrangements excluded from coverage in Section 2510.3-3.

3. Shift and Holiday Premiums
(Section 2510.3-3(b)).

In keeping with the preamble relating to proposed Section 2510.303(b) the term "weekend premiums" should be added to this paragraph. This addition would be consistent with the intent of the paragraph, and at the same time would be identical to the types of payments excluded in the "holiday premium" category.

4. Bonus Program
(Section 2510.303(h)).

The word "automatically should be substituted for the word "systematically" in the exception to the rule exempting bonus programs and the words ". . . to the termination of covered employment or beyond, or . . ." be *deleted.* While there may be a "system" for deferring bonus payments which might result in some payments occurring after termination of employment, the critical factor would seem to be the automatic nature of the provision in deferring income into the retirement years.

Also, bonus payments that are not deferred to provide retirement income but may be payable upon termination of employment, before or after retirement, and should not be treated as employee benefit plans because they are associated with regular wages or salaries.

5. Informal Policy on Absences
(Section 2510.3-3(1)).

We concur with the basic intent of this paragraph as stated in the preamble, i.e., to include those practices or arrangements which provide pay continuance on account of occasional short absences for personal reasons. However, the word "Informal" in the paragraph heading should be *deleted* since it is not only imprecise, but also seems somewhat irrelevant to the paragraph's intent.

Besides being difficult to determine whether a policy is formal or informal, the language could work to the detriment of employees in cases where employers decide: (1) to maintain an informal policy instead of formalizing it; or (2) to change a formal policy to an informal policy to avoid reporting requirements of the Act.

Additionally, for clarification purposes, the wording beginning—"but with no commitment . . . etc." should be *deleted;* substituting—"such as time off for doctor's visits and other personal reasons." This is suggested because there may well be a commitment to continue pay during such short absences. Absent clear legislative intent, this practice should not be the deciding factor in whether such an employer arrangement should be considered a covered employee benefit plan.

6. Paid Sick and Vacation Leave (Section 2510.3-3(m)).

We concur with the rationale for including both paid sick leave and paid vacations in the listing of plans not subject to Title I.

For the same reasons, Section 2510.3-3 should include a new sub-section on *paid holidays.* Paid holidays are clearly associated with regular wages or salary rather than benefits triggered by other contingencies. As noted in the preamble, there is no indication that Congress intended to cover holiday pay under Title I.

Additionally, the word "normal" modifying "compensation" should be *deleted.* The current wording implies that reporting would be required if *more* or *less* than normal compensation is paid during a vacation or illness. From a substantive point of view, it would be irrelevant whether or not normal compensation is paid. Many sick leave programs do not continue full (normal) compensation during the entire period of absence. For example, a program could provide for full pay for a

specified number of weeks, then half pay for a further number of weeks, with the length of either or both periods being contingent on the employee's length of service.

In addition, the phrase "normal compensation" would discriminate against those paid sick leave plans which recognize that sick pay is subject to certain favorable tax considerations, and thus adjust the amount of "normal compensation" to some percentage of gross pay that will result in approximately the same net after tax income to the employee.

The current wording would also discriminate against those plans which provide additional vacation pay to encourage off-season vacations.

It is further suggested that excluded payments not be limited to sickness but rather that the paragraph be amended to exclude payments for any disability, whether due to sickness *or* injury.

7. Certain Group Insurance Programs (Section 2510.3-3(p)).

While we concur that it would serve no useful purpose to cover certain insurance programs under Title I of the Act, it is not clear why these insurance programs must be "group" arrangements. The phrase "group insurance" commonly refers to an employee benefit arrangement with benefits guaranteed by a contract which meets the laws of the state as a group insurance contract.

There are other legally permissible insured mechanisms which permit the so-called mass marketing of *individual* policies to employees with the employer serving only as a conduit to pass the premiums on to the insurer.

Accordingly, the title of the subparagraph should be expressed as "Group or Employee Wholly Paid Insurance Programs."

Moreover, it should be noted that the *fifth* condition for the exclusion from coverage under Title I of a group insurance program is that the employer make "no representation" to employees that the insurance is "a benefit of employment."

This *fifth* condition should be *deleted* because: (1) most employees look on the payroll deduction, lower group rates, and other arrangements associated with employee pay-all insurance programs as a convenience and advantage; and (2) many employers would consider such arrangements as a part of the employee benefit program, and employers generally assist in enrolling interested employees.

8. Plans Without Employees (Section 2510.3-3(q)).

It is reasonable to interpret the exemption for "plan without employees" to include unfunded supplemental pensions payments for retired employees because individuals under such arrangements are no longer employees.

Such an exemption for such pension supplementals which are unfunded and which are paid prior to Social Security retireemnt age should be spelled out more clearly in this paragraph or should be set forth more completely in a separate paragraph under Section 2510.3-3.

9. Recommendations For Exclusion of Other Plans From Title I

There are several other major employee benefit plans, programs or arrangements that have a common denominator with the proposed excludable employee benefit programs and which, based on the rationale contained in the preamble to the regulations, should be excluded from Title I. These programs and arrangements should not be considered employee benefit plans under the Act because they are associated with regular wages and salaries rather than benefits triggered by other contingencies. While the listing set forth below is by no means complete

(and should not be for the reasons cited in the preamble), the following additional items should be added—individually or collectively—in the list of plans *not* covered under Title I:

(a) funeral leave or death in family absences;

(b) all military pay or military leave programs;

(c) tuition refund and similar employee (or dependent) scholarship assistance programs;

(d) all unfunded programs that provide continued income replacement benefits upon termination of employment, paid from general employer assets and payable only prior to the date of eligibility for full or reduced Social Security old age benefits and before normal retirement age;

* * * *

No. 85-1648

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Supreme Court, U.S.
FILED
JUN 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

CALIFORNIA HOSPITAL ASSOCIATION, a non-profit California corporation; CALIFORNIA RESTAURANT ASSOCIATION, a non-profit California corporation; CALIFORNIA MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA HOTEL AND MOTEL ASSOCIATION, a non-profit California corporation,

Petitioners,

v.

PATRICK W. HENNING, as Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' COMBINED SUPPLEMENTAL AND REPLY BRIEF

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No. 85-1648

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

CALIFORNIA HOSPITAL ASSOCIATION, a non-profit California corporation; CALIFORNIA RESTAURANT ASSOCIATION, a non-profit California corporation; CALIFORNIA MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA HOTEL AND MOTEL ASSOCIATION, a non-profit California corporation,

Petitioners,

v.

PATRICK W. HENNING, as Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California,

Respondent.

PETITIONERS' COMBINED
SUPPLEMENTAL AND REPLY BRIEF

INTRODUCTION

Pursuant to Rules 22.5 and 22.6 of this Court, Petitioners hereby respectfully submit their combined supplemental and reply brief.[1/] In the "supplemental" portion of this brief, Petitioners call to the Court's attention a new decision of the Fourth Circuit Court of Appeals, Holland v. National Steel Corp., No. 85-1707 (4th Cir. May 28, 1986), that was decided after the filing of the Petition herein. This new decision expressly rejects both the decision of the Ninth Circuit Court

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1/ For ease of reference and the convenience of the Court, Petitioners have combined their supplemental and reply briefs into one document. The "supplemental" portion of this brief is set forth at pages 1 through 12, and the "reply" portion of the brief is set forth at pages 13 through 26. In accordance with Rules 22.5, 22.6, and 33.3, Petitioners have kept well within the 20-page limitation separately applicable to each of the two portions of this combined brief. Finally, since Petitioners could not provide this brief with both a tan (supplemental brief) and yellow (reply brief) cover, see Rule 33, they have chosen a tan cover.

of Appeals in the instant case and the United States Department of Labor (hereinafter "DOL") regulation that formed the basis for the Ninth Circuit's decision.[2/] The Fourth Circuit noted that its decision in National Steel Corp. and the Sixth Circuit's decision in Blakeman v. Mead Containers, 779 F.2d 1146 (6th Cir. 1985), are both in direct conflict with the Ninth Circuit's decision. In the "reply" portion of this brief, Petitioners respond to those arguments that are raised for the first time in the opposition and amicus curiae briefs filed by Respondent and the DOL.

2/ See 29 C.F.R. § 2510.3-1(b). The National Steel Corp. decision is reproduced as Appendix L to this combined supplemental and reply brief. (Appendices A through J were submitted with the Petition and Appendix K was submitted with Respondent's opposition brief.)

ARGUMENT

I.

THE DIRECT CONFLICT BETWEEN THE NINTH AND OTHER CIRCUITS IS SPECIFICALLY ADDRESSED AND CONFIRMED IN THE FOURTH CIRCUIT'S MAY 1986 DECISION IN HOLLAND v. NATIONAL STEEL CORP.

A. The Ninth Circuit's Decision Is In Direct Conflict With Recent Decisions Of The Fourth And Sixth Circuits, As Well As Decisions Of Other Courts

Petitioners have requested this Court to grant a writ of certiorari in this case due in part to the enormous national significance of the issues presented and the conflict that exists between the decision of the Ninth Circuit and those of other courts, including certain decisions of this Court. Among the cases that presented a direct conflict when the Petition was filed was the decision of the

Sixth Circuit in Blakeman v. Mead Containers, supra, the decision of the highest state court in Massachusetts in Barry v. Dymo Graphic Systems, Inc., 394 Mass. 830 (1985), and two district court decisions, including the decision in Holland v. National Steel Corp., C.A. No. 83-0033-W(M) (N.D. W.Va. 1985).[3/]

The split in the circuits is clear and, since the filing of the Petition, has become even sharper. On May 28, 1986, the Fourth Circuit affirmed the district court decision in Holland v. National Steel Corp., Civ. No. 85-1707. The Fourth Circuit specifically rejected the DOL regulation and the Ninth Circuit's decision as unreasonable in light of the meaning of 29 U.S.C. § 1002(1), which the court found "quite plain."[4/] The court held

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3/ The Barry and National Steel Corp. cases are reproduced as Appendices J and I, respectively, of the Petition for Writ of Certiorari.

4/ The district court in this case and the Supreme Judicial Court of Massachusetts also agreed that the plain meaning of ERISA would extend its coverage to all funded and unfunded plans, funds, and programs that provide vacation pay.

that the definition of welfare plan set forth in the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, et seq. (hereinafter "ERISA"), covered the company's vacation and extended vacation benefits, which were "paid out of National's general funds." Slip Op. at p. 8, Appendix L at L12-L13 (emphasis added).

In addition to identifying the direct conflict that exists among the circuits, National Steel Corp. clearly rejects several contentions made by Respondent and the DOL in their briefs in opposition to the Petition. Respondent argues, for example, that the Sixth Circuit's decision in Blakeman and the Fourth Circuit's severance pay decision in Holland v. Burlington Industries, 772 F.2d 1140 (4th Cir. 1985), are entirely consistent with the Ninth Circuit's decision in this case. The Fourth Circuit flatly disagrees and construes the Sixth Circuit's decision to hold that all vacation plans are covered by ERISA even if paid from the employer's general funds. This

is in direct conflict with the position of the Ninth Circuit. Furthermore, the Fourth Circuit finds that its own decision in Holland v. Burlington Industries supports its recent conclusion that unfunded vacation programs are covered under ERISA. The Burlington Industries decision holds that unfunded severance pay plans are subject to ERISA. In National Steel Corp., the court simply extends its rationale to hold that ERISA covers unfunded vacation plans as well as unfunded severance pay plans. In short, the Fourth Circuit agrees with the DOL regulations insofar as they provide that ERISA covers unfunded severance pay programs, but rejects the section in the regulations that excludes unfunded vacation programs from ERISA.

Consequently, it is clear that a sharp conflict exists between the Ninth Circuit on the one hand and the decisions of the Sixth and Fourth Circuits on the other. Moreover, the Supreme Judicial Court of Massachusetts in Barry and the federal district court in

Louisiana in James v. T.G. & Y. Stores Co., No. 85-0113 (W.D. La. 1985), have reached the same conclusions as the Fourth and Sixth Circuits. Thus, five courts, including three circuits, have addressed this issue in the past 15 months. Not only does a clear split exist, the Ninth Circuit stands completely alone in concluding that the source from which vacation pay benefits are provided controls the outcome of the ERISA coverage issue. All of the other four courts have properly concluded that ERISA's plain language covers every plan, fund or program that provides vacation pay benefits, regardless of whether those benefits are paid from an employer's general assets or a separate fund.

B. The Fourth Circuit Has Agreed With Petitioners' Contention That The Sixth Circuit's Decision In Blakeman v. Mead Containers Conflicts With The Ninth Circuit's Holding In This Case

Respondent and the DOL did not have the benefit of the National Steel Corp. decision when they filed their opposition briefs. Accordingly, they questioned the significance of the Sixth Circuit's decision in Blakeman, which concluded that the employer's unfunded vacation plan was covered by ERISA and that the state laws governing the vacation claim were therefore preempted. The National Steel Corp. decision demonstrates that Petitioners were fully correct in their interpretation of Blakeman.

Respondent argued that, because the parties in Blakeman had conceded the issue of ERISA coverage, the Sixth Circuit failed to

address this critical jurisdictional issue.[5/] However, Respondent and the DOL overlooked the fact that the Sixth Circuit clearly focused on the jurisdictional issue. The Sixth Circuit was also aware that a decision that unfunded vacation plans are covered by ERISA would conflict with the Ninth Circuit's decision in this case, as well as the DOL regulation. In fact, the Sixth Circuit cited the Ninth

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5/ The vacation pay claim in Blakeman sought vacation pay for 1984. It is clear that the claim was for what Respondent calls "ordinary vacation pay" and what the DOL considers "wages" pursuant to a "mere payroll practice." The employer's informal vacation policy did not involve a separate fund or trust. This was confirmed by the defendant/appellee's counsel in Blakeman. Indeed, the vacation policy in issue was set forth in informal guidelines that simply provided: "Salaried employees who have completed the necessary length of service requirements and who are in the employment of the company as of close of business on December 31 will become entitled on that date to vacation time allowance with pay . . . [for] the subsequent calendar year." Brief of Defendant-Appellee before the Sixth Circuit Court of Appeals at pp. 13-14 (emphasis added).

Circuit's decision immediately after concluding that there was "little doubt that . . . the severance pay and vacation provisions are 'employee welfare benefit plans' as defined in 29 U.S.C. § 1002(1)." 779 F.2d at 1149 & n. 2. The court cited the Ninth Circuit's decision in footnote 2 with a "But see" signal to demonstrate that the Ninth Circuit's holding directly contradicted the language in 29 U.S.C. § 1002(1), which the Sixth Circuit found dispositive of the ERISA coverage issue. Indeed, as explained above, the direct conflict between the Sixth and Ninth Circuits has been expressly recognized by the Fourth Circuit in the National Steel Corp. case.

C. The Fourth And Sixth Circuits Have Specifically Rejected The Erroneous Implications Respondent And The DOL Have Drawn From Prior Decisions Of Those Circuits

Respondent and the DOL have asserted that

the Ninth Circuit's decision is supported by the indirect implications of the Sixth Circuit's decision in Abella v. W.A. Foote Memorial Hospital, Inc., 740 F.2d 4 (6th Cir. 1984), which involved sick leave, and the Fourth Circuit's decision on severance pay in Holland v. Burlington Industries, supra. Significantly, however, neither of these cases addressed ERISA's coverage of vacation benefits provided from an employer's general assets. Furthermore, both the Fourth and Sixth Circuits have since had the opportunity to examine the precise DOL regulation at issue herein, the Ninth Circuit's decision, and the application of ERISA to vacation pay benefits provided from unfunded plans. Both circuits have since confirmed that ERISA does apply to such plans even where no separate fund or trust arrangement exits. Moreover, both circuits agreed with the district court's holding in this case that ERISA preempts state laws that relate to such vacation plans. Accordingly, the Sixth and Fourth Circuits

have directly dispelled the implications that Respondent and the DOL erroneously suggest should be drawn from their prior decisions in Abella and Burlington Industries. It is thus clear that the Ninth Circuit's reliance on Abella to conclude that unfunded vacation plans fall outside of ERISA's scope was misplaced.[6/]

6/ Interestingly, the DOL states that each employer can control its own fate by determining whether ERISA or state law will govern its vacation program. Despite the obfuscation regarding a purported "wage/benefit" distinction, the DOL concedes that "[i]t is true that an employer who creates a trust to pay vacation benefits and separately funds it in advance thereby establishes a plan governed by the federal statute, whereas an employer who merely continues to make ordinary wage payments from general assets while employees are on vacation remains subject to the state law." In fact, the DOL states that the employer's motivation is irrelevant and it can "choose," if it desires, "to avoid one or the other [state or federal] of the statutory schemes." DOL Brief in Opposition at p. 11.

Congress did not create the comprehensive scheme of federal regulation set forth in ERISA with the expectation that employers could manipulate coverage as the DOL suggests. Rather, broad coverage of all

II.

THE DOL REGULATION MUST BE DISREGARDED UNDER ANY STANDARD

Respondent and the DOL argue that the DOL's "payroll practice" regulation is entitled to great deference and must be upheld if deemed "reasonable." In making this argument, Respondent chastises Petitioners for acting "as if Congress had not granted [the DOL] rulemaking and definitional power in 29 U.S.C. § 1135, and instead had asked courts to construe ERISA's definitional sections

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6/ Continued

enumerated plans, funds, and programs was envisioned as a means of advancing the national interest in employee benefit plans by protecting such plans from a multiplicity of hastily contrived and conflicting laws devised by the states to deal with some aspect of employee benefit regulation.

de novo."[7/] Opposition Brief at p. 6. Petitioners respectfully submit that this Court does not require Congress' invitation or permission to construe the language of ERISA (or any other federal statute) de novo. Indeed, it would appear obvious that this type

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7/ 29 U.S.C. § 1135 contains a general and limited grant of interpretative rule-making authority to the DOL. It is designed primarily to assist the DOL to carry out its responsibilities in connection with the reporting and disclosure provisions of ERISA. Specifically, the statute permits the DOL to prescribe forms and bookkeeping procedures and to "define accounting, technical and trade terms." Here, Respondent and the DOL have placed themselves in the ridiculous posture of having to characterize "vacation benefits" as an "accounting," "technical" or "trade" term. Obviously, in granting the DOL authority to define esoteric and arcane terms, Congress did not intend to give the DOL carte blanche power to define statutory terms of common understanding, such as "vacation benefits," so as to narrow dramatically Congress' own definition of a "welfare plan." See 29 U.S.C. § 1002(1). Respondent and the DOL ask the Court to accord greater deference to the regulation than to the language of the statute that it purports to construe.

of statutory review is among the fundamental responsibilities of this Court.

Contrary to the arguments of Respondent and the DOL, the payroll practice regulation at issue herein is merely a statutory interpretation that this Court is completely free to reject. It is well settled that "the courts are the final authorities on issues of statutory construction . . . and are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute." Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726 at 745-746, 36 L.Ed.2d 620, 935 S.Ct. 1773 (1973) (emphasis added). Moreover, this Court has repeatedly stressed that "the starting point for interpreting a statute is the language of the statute itself," and that "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Con-

sumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 at 108, 64 L.Ed.2d 766, 100 S.Ct. 2051 (1980).[8/] Here, this Court need only read the clear and unambiguous words of the statute to understand the scope of 29 U.S.C. § 1002(1) and to conclude that the state laws at issue in this case are pre-empted.[9/]

Quite simply, one does not require the interpretative guidance of an employee benefits expert or the DOL to understand the term "vacation benefits." Furthermore, the Ninth

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8/ This Court recently applied these principles of statutory construction in construing ERISA's language in Shaw v. Delta Air Lines, Inc., 463 U.S. 85 at 97, 77 L.Ed.2d 490, 103 S.Ct. 2890 (1983). In that case, the Court stated: "We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning" (emphasis added).

9/ The DOL's regulation can be summarily dismissed under the authority of United States v. Vogel Fertilizer Co., 455 U.S. 16, 70 L.Ed.2d 792, 102 S.Ct. 821 (1982), and Rowan Companies v. United States, 452 U.S. 247, 68 L.Ed.2d 814, 101 S.Ct. 7288 (1981).

Circuit's assertion that the DOL's interpretation is reasonable because the term does not have an "immutable" meaning simply evades the correct inquiry, namely, whether the term has a plain meaning within the statutory context.[10/] The four courts other than the Ninth Circuit that have recently examined this precise issue have uniformly concluded that the language used by Congress is quite plain and extends to vacation plans, funds and programs financed from an employer's general assets.

The legislative history of ERISA, as well as the statute itself, demonstrate the accuracy of this conclusion. They reveal an

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10/ Obviously, it is rare that any term will have an immutable (i.e., unchangeable) meaning. This does not mean, however, that mutable terms cannot have a plain meaning when used in a specific statutory context. The Ninth Circuit's suggestion to the contrary simply invites agencies such as the DOL to muddle the clear language of a statute with administrative "construction" and thereby thwart the intent of Congress.

unmistakable congressional concern to occupy the entire employee benefit field and remove every plan, fund or program that provides benefits identified in 29 U.S.C. § 1002(1) from potential state regulation. See Shaw v. Delta Air Lines, Inc., 77 L.Ed.2d at 506 & n. 25. Based on the unambiguous language in 29 U.S.C. § 1002(1) and this preeminent congressional purpose, it is clear that the DOL regulation not only conflicts with ERISA's plain language, but is also arbitrary, irrational, and an inappropriate exercise of the DOL's authority.

III.

THE "WAGE/BENEFIT" AND "OCCASION-CIRCUMSTANCES-SOURCE" JUSTIFICATIONS FOR THE DOL REGULATION ARE ANALYTICALLY HOLLOW AND ENTIRELY WITHOUT MERIT

Respondent, the DOL, and the Ninth Circuit have all attempted to justify the DOL's payroll practice regulation based on "wage/

benefit" and "occasion-circumstances-source" theories. The "wage/benefit" thec is that Congress intended ERISA to regulate the payment of employee benefits and not the payment of wages during "ordinary vacations."[11/] It is clear, however, that this "wage/benefit" theory of ERISA coverage is analytically meaningless. Throughout the country, states such as California have hastened to assert regulatory authority over employee benefit

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11/ Petitioners are somewhat mystified by Respondent's talismanic use of the term "ordinary vacations" in his opposition brief. Respondent appears to argue that the term "ordinary vacations" has a commonly understood meaning that somehow places the vast majority of this nation's vacation plans beyond the range of ERISA regulation. There is nothing in ERISA's legislative history to suggest that Congress intended the Act to cover only an "extraordinary vacation." Moreover, based on Respondent's own definition, state laws regulating "ordinary vacations" were found preempted by the Sixth Circuit in Blakeman, supra, by the Fourth Circuit in National Steel Corp., supra, and by the Supreme Judicial Court of Massachusetts in Barry, supra.

plans under the guise of "wage" regulation.[12/] Moreover, it is difficult to fathom how the payment of vacation benefits from an employer's general assets is any less a "benefit" under the "wage/benefit analysis" than the payment of the same benefits from a trust. The payment serves the same purpose, is triggered by the same event, is paid in the same amount, and is subject to the same tax consequences. Quite simply, the "wage/benefit" distinction is a semantic shell game

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12/ See footnote 21 of the Petition for Writ of Certiorari. Petitioners must confess their bemusement at Respondent's assertion that "[t]he unpredictable and highly contingent nature of severance pay . . . is reflected in common speech which never confuses it with wages." Opposition Brief at 12, footnote 12. Respondent has not always construed the term "severance benefits" with such clarity. Indeed, one of the Petitioners recently succeeded in enjoining Respondent from enforcing the California severance pay laws. In that case, Respondent argued that severance pay was simply another form of "wages" and therefore was subject to state law regulation. See California Chamber of Commerce v. Simpson, 601 F.Supp. 104 (C.D. Cal. 1985).

that is utterly useless in interpreting the scope of ERISA's coverage.

The "occasion-circumstances-source" theory of ERISA coverage is equally hollow. This so-called "three-part test" purportedly delimits ERISA's scope "in terms of the occasion for payment, the circumstances in which it was made, and the source." Opposition Brief at 8; 770 F.2d at 860; App. B at B-8. It is patently clear, however, that the only prong in this "test" that has any substance is the third prong, which focuses simply on the "source" of payment of the benefits. The "occasion" and "circumstances" in which vacation benefit payments are provided are both the same whether those benefits are paid from a separate fund or an employer's general assets. Nevertheless, under the DOL's regulation, only the trust-funded benefits are covered by ERISA and only because they are paid from a source other than the employer's general assets.

In reality, the "occasion-circumstances-source" theory of ERISA coverage is nothing

more than a sterile rationale for the DOL's conflicting treatment of severance and vacation benefits. Since the DOL does not require severance benefits to be paid from a trust in order to be covered under ERISA, it is necessary to provide some justification for imposing such a requirement on vacation benefits. This in turn necessitates distinguishing severance benefits from vacation benefits. Since severance benefits are always paid at termination and vacation benefits are normally paid during employment,[13/] the "occasion" and "circumstances" for payment of these two types of benefits differ. Thus, the DOL's conflicting treatment of general asset severance benefits and general asset vacation benefits is purportedly justified on the theory that the "source" of payment is not the only

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13/ Coincidentally, the state laws at issue in this case directly regulate only vacation benefit obligations that become payable at termination.

relevant factor; one must also consider the "occasion" and "circumstances" of payment.

The "occasion-circumstances-source" theory is predicated on the presumption that Congress had a two-fold intent in extending ERISA's coverage to welfare plans. First, Congress desired to prevent trust fund abuse. Second, Congress wished to protect employees against benefit defaults. Obviously, ERISA coverage of general asset plans of any kind, whether severance pay or vacation plans, is completely unnecessary to further Congress' intent to curb trust fund abuse. Accordingly, it would appear logical for the DOL to exclude both general asset severance and vacation plans from ERISA's scope if the concern for "abuse" had been the sole factor. The DOL excludes only general asset vacation plans, however, based apparently on the position that there is a greater likelihood of default with respect to severance benefits than vacation benefits. Therefore, the DOL contends that coverage of unfunded severance pay plans is

consistent with Congress' second purpose in extending ERISA to welfare plans.

In short, the "occasion-circumstances-source" theory of ERISA coverage is just a convoluted way of saying that ERISA coverage of unfunded severance plans is justified because there is a greater risk of default with respect to severance benefits than exists with respect to vacation benefits. As noted in footnote 11 in the Petition for Writ of Certiorari, however, this "fear-of-default" rationalization falls apart in the context of this case. First, the DOL's purported assumption that a greater fear of default arises in connection with unfunded severance pay programs is not corroborated by ERISA or its legislative history. In addition, California's requirement that vacation benefits be prorated upon termination creates a greater potential for default in connection with large employee layoffs and plant sales or closings than exists with respect to severance benefits. The reason is clear. Greater numbers

of employees are covered by vacation plans than severance pay plans. Moreover, the contingencies that trigger severance pay liabilities, e.g., layoffs or separations from employment, represent only some of the contingencies that engender vacation pay liabilities. It is thus plain that the analytical justification for the "occasion-circumstances-source" theory of ERISA coverage simply does not apply in the context of the state laws involved in this case.

Further, the three-pronged test relied on by Respondent and the DOL is completely meaningless when applied to vacation claims. It provides no basis whatsoever other than the existence of a fund to distinguish between unfunded vacation programs that the DOL asserts fall outside ERISA coverage and funded programs that it believes are covered. In short, the source of payment is the only real distinction used by the DOL to ascertain which vacation benefits are subject to ERISA and

which are not.[14] Given the absence of any minimum or advance funding requirement for welfare plans in ERISA, this is truly a distinction without a difference.[15]

14/ See note 6, supra.

15/ The DOL's suggestion that advance funding is a prerequisite to the existence of a trust under ERISA is inaccurate. ERISA carves out a specific exemption from its minimum and advance funding requirements for vacation and other welfare plans even where a trust is used. 29 U.S.C. § 1081(a)(1). Indeed, any "advance" funding that an employer voluntarily elects to make can be in whatever amount it chooses, such as a sum equal to what the employer expects to pay during the next week, month, or quarter. This certainly affords no greater source or security for the payment of benefits than does the employer's general assets.

The DOL also contends, quite erroneously, that an "independent" trustee will function as a watch dog to ensure that trust funds are collected and all benefits are paid. DOL's Opposition Brief at pp. 10-11. First, ERISA allows employers to appoint a member of their own staff to function as the trustee. 29 U.S.C. § 1103(c)(1). See, e.g., 26 C.F.R. § 1.501(c)(9)-1.502(c)(3) (trustee of a Voluntary Employee Beneficiary Association (VEBA) trust can be anyone where the VEBA provides vacation or other welfare benefits described in 29 U.S.C. § 1001(1)). Second, even if an "independent" Trustee is selected, the only assets over which the trustee will have

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals in this case.

Respectfully submitted,

DATED: June 9, 1986

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5/ Continued

authority consist of those sums which the employer has elected to deposit in the trust. Again, there is no minimum or advance funding obligation and thus no authority for the trustee to insist that advance funding occur.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1707

Barbara G. Holland,

Appellant,

versus

National Steel Corporation,

Appellee.

Appeal from the United States District Court for the Northern District of West Virginia, at Wheeling. Robert E. Maxwell, Chief United States District Judge. (C/A 83-0033).

Argued: March 5, 1986

Decided: May 28, 1986

Before RUSSELL, SPROUSE and CHAPMAN, Circuit Judges.

W. Dean DeLaMater (DeLaMater, Hagg & Bohach on brief) for Appellant; Carl H. Hellerstedt, Jr. (Volk, Robertson, Frankovitch, Anetakis and Hellerstedt on brief) for Appellee.

SPROUSE, Circuit Judge:

Barbara Holland appeals from the district court's grant of summary judgement in favor of her former employer, National Steel Corporation (National). In her diversity action, Holland alleged that National Steel violated her employment contract and failed to pay wages and vacation benefits in accordance with West Virginia state law when it laid her off in 1982. The district court found that Holland's breach of contract claim failed to state a cause of action under West Virginia law, that the Employment Retirement Income Security Act, 29 U.S.C. 1001 et seq. (1982) (ERISA), preempted her claims with respect to the payment of vacation benefits and that her claim arising from the late payment of wages was moot. We affirm.

I.

National employed Holland as an hourly employee at its Weirton Steel Division beginning in 1965. Prior to October 1978, she was

a member of a collective bargaining unit in the Weirton Independent Steelworkers Union (ISU). In October 1978, National promoted her to foreman, a position outside of the collective bargaining unit. The collective bargaining agreement then in effect between National and the ISU provided that promotion to such a position would cause a break in the continuous service upon which an employee's seniority was based. If, however, the employee was later transferred back or demoted to a job in the bargaining unit, her seniority would be restored with full credit for her service in the exempt position.

Holland first expressed an interest in returning to an hourly position in 1980. National responded that she would have to wait until she was no longer needed in her current department. On August 1, 1980, a new collective bargaining agreement between National and ISU took effect which prohibited the return of a supervisor to hourly employment if hourly employees were laid off or if the reason for

the supervisor's return was the elimination of the supervisory position. The agreement also provided for an "open window" period in which upper level management could designate certain supervisors whom they would permit to return to the bargaining unit before October 1, 1980. After that date, supervisors would be able to return to the bargaining unit only if the contractual provisions were satisfied.[1/] In December 1980, having heard that she might be transferred to another salaried position, Holland informed National that she would prefer to return to her former hourly position rather than accept a transfer. A National superintendent informed her that he was not aware of any plan to transfer her.

1/ In July, 1980, National conducted a series of meetings with supervisory personnel to explain the agreement's provisions including the "open window." Holland does not recall attending any such meeting, and National, for the purposes of this appeal, concedes that she did not.

In February 1982, Holland learned that she could no longer return to an hourly position if any hourly employees were on layoff. In early March, National informed her that her last day of work would be March 6, 1982. As of that date, Holland was entitled to three weeks vacation and five days of salary for days actually worked. National required her to take her unused vacation beginning March 6, 1982 and erroneously allowed her an extra week of vacation. Accordingly, her separation became effective April 2, 1982.[2/] National paid her remaining salary and vacation wages in a check issued March 31, 1982, pursuant to its policy of paying salaried employees on the last day of the month. After April 2, 1982, Holland became eligible for benefits under National's

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2/ Holland argues that her layoff was March 6, 1982, the last day she actually worked. The district court found April 2, 1982 to be the layoff date.

Income Protection Plan, a program providing supplemental unemployment benefits.[3/]

National also had an extended vacation plan to provide two weeks of additional vacation to employees who had worked for the company for more than fifteen years. Under this plan, Holland was eligible for two weeks of additional vacation as of January 1, 1982. The plan also called for payment of unused extended vacation time to terminated employees. National, however, eliminated the entire program on March 8, 1982, prior to the effective date of Holland's layoff, and

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3/ At the time National informed Holland that she was to be laid off, it had in effect a policy allowing laid off employees the option of taking unused vacation pay as (1) time off prior to the effective date of the layoff or (2) a lump sum payment in lieu of time off. National did not give Holland the option of electing the latter, but required her to take her remaining vacation prior to her layoff. National asserts that it did not give her the option because its Income Protection Plan providing a supplement to state unemployment compensation benefits required exhaustion of vacation eligibility.

Holland received no payment for extended vacation benefits.

II.

Holland first maintains that the district court erred in granting National summary judgment on her claim that National violated her individual employment contract by not permitting her to return to the hourly ranks when National laid her off from her supervisory position in 1982. The gravamen of Holland's claim is that she and National entered into an employment contract which provided her the right to return to hourly employment and that National's subsequent collective bargaining agreement with the ISU did not alter her personal contract. The district court found, however, that the basis of her previous right to return to hourly employment was the 1977 collective bargaining agreement between ISU and National, and that the 1980 agreement subsequently eliminated that right. We agree with the district court

that this claim does not present an issue of material fact and that National was entitled to summary judgment on the claim.

III.

Holland next contends that National's failure to pay her any extended vacation benefits and its failure to pay her wages and regular vacation pay until March 31, 1982 violated West Virginia law. West Virginia requires employers to pay their employees at least every two weeks unless a special agreement provides otherwise. W. Va. Code § 21-5-3 (1985).[4/] In addition, employers

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4/ W. Va. Code § 21-5-3 provides in part:

> Every person, firm or corporation doing business in this State, except railroad companies as provided in section one [§ 21-5-1] of this article, shall settle with its employees at least once in every two weeks, unless otherwise provided by special agreement, and pay them the wages due, less authorized deductions and authorized wage assignments.

There was no such special agreement in effect during the relevant portion of Holland's employment with National.

must pay laid off workers any wages earned at the time of the layoff no later than the next regular payday or be subject to liquidated damages of up to thirty days wages in addition to the amount of wages due. W. Va. Code § 21-5-4(d), (e) (1985).[5/]

The state law contention which Holland raised related both to regular wages and

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5/ W. Va. Code §§ 21-5-4(d) and (e) state in part:

> (d) . . . when an employee for any reason whatsoever is laid off, the person, firm or corporation shall pay in full to such employee not later than the next regular payday, either through the regular pay channels or by mail if requested by the employee, wages earned at the time of suspension or layoff.
>
> (e) If a person, firm or corporation fails to pay an employee wages as required under this section, such person, firm or corporation shall, in addition to the amount due, be liable to the employee for liquidated damages in the amount of wages at his regular rate for each day the employer is in default, until he is paid in full, without rendering any service therefor: Provided, however, that he shall cease to draw such wages thirty days after such default.

vacation pay. We first treat her vacation pay argument. She maintains that she was entitled to two weeks of extended vacation benefits for her fifteen years of service and to liquidated damages for National's failure to pay her regular vacation benefits until March 31, 1982. The district court held that ERISA preempted her claims for vacation benefits under state law because such benefits are part of an employee welfare benefit plan. 29 U.S.C. § 1144(a).[6/] ERISA provides in pertinent part:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organi-

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6/ 29 U.S.C. § 1144(a) states:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employer benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

> zation, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) . . . benefits in the event of . . . unemployment, or vacation benefits . . . or (B) any benefit described in section 186(c) of this title. . . . 7/

29 U.S.C. § 1002(i). The United States Department of Labor, through its regulations, has interpreted this section to exempt from ERISA vacation benefits which employers provide out of their general assets as distinguished from vacation benefits paid from a dedicated fund. The regulations state:

> (b) Payroll practices. For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include--
>
> . . . .
>
> (3) Payment of compensation, out of the employer's general

7/ 29 U.S.C. § 186(c) refers to, inter alia, "a trust fund established . . . for the purpose of pooled vacation, holiday, severance or similar benefits."

> assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example--
>
> (i) Payment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons . . . .

29 C.F.R. § 2501.3-1(b). Holland asserts that this regulation exempts National's vacation plans from ERISA's preemptive effect, because the benefits are paid out of National's general funds. The meaning of 29 U.S.C. § 1002(1) is, however, quite plain and does not exempt National's vacation plans. As the district court concluded, the statute preempts Holland's state claims for both regular vacation and extended vacation benefits.

In reaching a contrary result, the Ninth Circuit Court of Appeals found the statutory language of section 1002(1) ambiguous and the Department of Labor regulation reasonable.

California Hospital Association v. Henning, 770 F.2d 856, 859 (9th Cir. 1985). We are, however, persuaded by the reasoning of the Sixth Circuit Court of Appeals which has held vacation plans to be "employee welfare benefit plans" as defined in 29 U.S.C. § 1002(1). Blakeman v. Mead Containers, 779 F.2d 1146, 1149 (6th Cir. 1985). Blakeman is, in our view, consistent with our holdings in Powell v. Chesapeake and Potomac Telephone Co. of Virginia, 780 F.2d 419, 421-22 (4th Cir. 1985) and Holland v. Burlington Industries, 772 F.2d 1140, 1146-47 (4th Cir. 1985). These cases recognize that ERISA's preemption clause, 29 U.S.C. § 1144(a),

> effectuates a broad remedial policy to protect the interests of participants in ERISA-governed plans and their beneficiaries 'by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.'

Powell, 780 F.2d at 421 (citation omitted).

Holland also contends that she is entitled to liquidated damages for National's failure to pay her final earned wages until March 31, 1982, twenty days after they were due under the scheme of sections 21-5-3 and 21-5-4 of the West Virginia Code. Section 21-5-4(e) provides for liquidated damages to a laid off employee when the employer fails to pay wages earned at the time of a layoff by the next regular payday. At the heart of this claim is Holland's insistence that she was laid off effective March 6, and thus any wages due her had to have been paid by March 11, 1982, her next regular payday under section 21-5-3. The district court determined that she was laid off effective April 2, 1982, and we agree with this determination. Holland, therefore, is not entitled to liquidated damages under section 21-5-4(e) because National paid her three days before April 2,

1982, the effective date of her layoff.[8/] Since liquidated damages are not available, and Holland on March 31, 1982 received all wages due her, the district court properly granted summary judgment in favor of National.

In view of the above, the judgment of the district court is affirmed.

AFFIRMED.

8/ There is, in our view, no question that National committed at least a technical violation of section 21-5-3 by not paying Holland every two weeks pursuant to that section. The liquidated damage section, section 21-5-4(e), however, applies only to section 21-5-4, and, as we have determined, Holland is not entitled to damages under that section. Because on March 31, 1982, National paid her the five days of regular wages which she earned in early March, we find that the violation of section 21-5-3 alone does not provide a basis for awarding her damages.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles. I am over the age of eighteen years and not a party to the within action. My business address is One Wilshire Boulevard, Suite 2100, Los Angeles, California, 90017. On this date, April 7, 1986, I served the within COMBINED SUPPLEMENTAL AND REPLY BRIEF in the matter styled "California Hospital Association, et al. v. Patrick W. Henning" in the United States Supreme Court, October Term, 1985, on all other parties to said action by placing 3 true copies thereof enclosed in a sealed envelope with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on June 10, 1986 at Los Angeles, California.

CATHERINE BELLOMO
Catherine Bellomo

(3)

No. 85-1648

FILED
MAY 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

CALIFORNIA HOSPITAL ASSOCIATION, ET AL., PETITIONERS

v.

PATRICK W. HENNING, LABOR COMMISSIONER, DEPARTMENT OF INDUSTRIAL RELATIONS, STATE OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Department of Labor's "payroll practices" regulation, which defines the term "employee welfare benefit plan" in the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. (& Supp. II) 1001 *et seq.*, to exclude arrangements for granting employees paid vacation leave out of an employers' general assets, is a permissible construction of the statute.

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In the Supreme Court of the United States

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No. 85-1648

CALIFORNIA HOSPITAL ASSOCIATION, ET AL., PETITIONERS

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PATRICK W. HENNING, LABOR COMMISSIONER, DEPARTMENT OF INDUSTRIAL RELATIONS, STATE OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case concerns the validity of a Department of Labor regulation defining the scope of coverage of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. (& Supp. II) 1001 *et seq.* The regulation (29 C.F.R. 2510.3-1(b)), identifies certain "payroll practices," such as paid vacation, holiday, and sick leave, as outside the scope of "employee welfare benefit plans" covered by the statute. The district court in this case concluded that the payroll practices regulation is invalid. The Department of Labor participated as an amicus curiae in the court of appeals, which reversed the decision of the district court and upheld the Department's construction of ERISA as inapplicable to routine vacation leave arrangements. Since the Secretary of Labor is charged with enforcing the reporting and disclosure and the fiduciary obligations that Title I of ERISA imposes on employee

benefit plans covered by the Act, he has a substantial interest in the interpretation of ERISA's coverage and definitional provisions. The Secretary also has a substantial interest in defending the interpretation and application of the Department's regulation in this case.

STATEMENT

1. California, by statute, requires that when an individual's employment terminates before the employee has taken paid vacation leave provided under an employer policy, "all vested vacation shall be paid * * * as wages at [the employee's] final rate" (Cal. Lab. Code § 227.3 (West Supp. 1986)). The statute forbids the forfeiture of vested vacation time upon termination of employment. *Ibid.* Construing these provisions, the California Supreme Court has held that a proportionate right to paid vacation "vests" as labor is rendered. See *Suastez* v. *Plastic Dress-Up Co.*, 31 Cal. 3d 774, 647 P.2d 122, 183 Cal. Rptr. 846 (1982). Respondent, the California Labor Commissioner, is responsible for administering the state vacation wage law. In September 1982, he issued a policy memorandum explaining that under the statute, as interpreted in *Suastez*, "an employee who is terminated or who terminates before an eligibility date for vacation pay, is entitled to pro rata vacation pay for time served up to the date of termination" (Pet. App. G1-G2).

Petitioners – various California trade associations – and many of their employer members have established vacation leave policies that provide for the payment of compensation out of the employers' general assets while employees are on vacation. Contrary to California law, however, the policies forbid payment of prorated vacation pay and require the forfeiture of vacation pay accumulated by employees who are not actively employed on a specified eligibility date, typically the anniversary of hire (Pet. App. B2).

2. Petitioners brought suit in the United States District Court for the Central District of California seeking to enjoin the California Labor Commissioner from enforcing the state law against the Associations and their members. Arguing that their vacation leave policies fell within ERISA's definition of the term "employee welfare benefit plan" as "any plan, fund, or program * * * established or maintained by an employer * * * for the purpose of providing * * * *vacation benefits*" (29 U.S.C. 1002(1) (emphasis added)), they sought a declaration that Section 514(a) of ERISA, 29 U.S.C. 1144(a), preempted California's vacation wage law as applied to their practices. The district court accepted the Association's argument based on what it considered to be the "plain language" of the statute. In so doing, it expressly rejected a Department of Labor regulation (29 C.F.R. 2510.3-1(b)) which interpreted the definition of "employee welfare benefit plan" to exclude certain unfunded "payroll practices," including the "[p]ayment of compensation, out of the employer's general assets, * * * while an employee is on vacation or absent on a holiday * * *." The court concluded that "[i]f that regulation does indeed intend ERISA exemption of every unfunded vacation program, it is at clear odds with the language of the statute itself and an invalid arrogation of power by the Department" (Pet. App. C7-C8).

3. The United States Court of Appeals for the Ninth Circuit reversed (Pet. App. B1-B21). Contrary to the district court's decision, the court of appeals found that the term "plan * * * providing vacation benefits" in the statutory definition of "employee welfare benefit plan" has "no precise and immutable meaning" (*id.* at B5). The court held that it is "a reasonable and permissible construction of the statute to exclude from its coverage, as [29 C.F.R. 2510.3-1(b)] does, programs providing for the traditional vacation during which the employee continues

to receive ordinary wages paid from the general assets of the business" (Pet. App. B6). The court determined that the regulation reasonably distinguishes between "wage" compensation in the nature of cash wages or other analogous payments such as paid vacation leave made during the period of employment, which ERISA does not cover, and deferred "benefit" compensation, which Congress sought to regulate through the statute (*id.* at B8, B10-B11).

The court rejected petitioners' argument that because ERISA generally covers unfunded benefit plans, unfunded vacation payments must also be covered by the statute. In this regard the court found that nothing in the statute or its legislative history suggests that Congress intended ERISA to regulate routine vacation leave payments when made from an employer's general assets (Pet. App. B7, B18-B19). Coverage of such arrangements would not provide redress for the two principal abuses addressed by ERISA: mismanagement of funds accumulated to finance benefits and failure to pay employees the benefits promised. Thus, because vacation "[w]ages are ordinarily paid in cash out of the resources of the business * * * [t]here is no fund to administer and no special risk of loss or nonpayment" (*id.* at B7). Accordingly, the court explained that the Department's interpretation that paid vacation leave arrangements are not covered by the statute "is not based on the funded/unfunded distinction alone, however, but also on the wage/benefit compensation distinction" which inheres in the statute (*id.* at B18).

Finally, the court concluded that ERISA coverage of routine vacation leave arrangements would impose "a substantial and needless burden upon employers and the federal courts" since ERISA requires employers to comply with numerous statutory requirements and permits an employee claiming denial of vacation leave to sue the employer in federal court (Pet. App. B11-B12).

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other federal court of appeals. Review by this Court is therefore unwarranted.

1. a. Congress sought through ERISA to protect the interests of participants and beneficiaries of employee benefit plan[s] "by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts" (29 U.S.C. 1001(b)). Coverage of the statute extends, with certain exceptions not applicable here, to any employee benefit plan established or maintained by an employer in interstate commerce (29 U.S.C. 1003). The "employee benefit plan[s]" covered by the statute encompass both "pension benefit plan[s]" and "welfare benefit plan[s]" (29 U.S.C. 1002(3)). Section 3(1) of ERISA defines "employee welfare benefit plan" or "welfare plan" as "any plan, fund, or program * * * established or maintained * * * for the purpose of providing * * * (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or *vacation benefits* * * * or (B) any benefit described in section 186(c) of this title * * *."[1] 29 U.S.C. 1002(1) (emphasis added).

The statute does not define the term "vacation benefits." Contemporaneous with the passage of ERISA, and in response to "numerous inquiries" concerning coverage of various forms of general asset compensation, however, the

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[1] The cross-reference is to Section 302(c) of the Labor-Management Relations Act, 1947 (LMRA), 29 U.S.C. 186(c), which describes, in addition to many of the same benefits enumerated in the ERISA definition, "pooled vacation, holiday, severance or similar benefits * * *." See 29 U.S.C. 186(c)(6).

Department of Labor promulgated regulations construing the definition of "employee welfare benefit plan" to exclude certain types of "payroll practices" including the "[p]ayment of compensation, out of the employer's general assets * * * while an employee is on vacation or absent on a holiday * * *." 29 C.F.R. 2510.3-1(b)(3); 40 Fed. Reg. 24642 (1975) (proposed regulations); 40 Fed. Reg. 34526 (1975) (final regulations). Based on the purposes and legislative history of the statute, and given the "substantial and needless burden" that would be imposed under the position urged by petitioners, the court of appeals correctly upheld the regulation as a "reasonable and permissible" construction of the statute. In reaching this conclusion the court below properly accorded the regulation "persuasive weight because it was formulated contemporaneously with the passage of ERISA" by the agency charged with administering the statute (Pet. App. B4). See also 29 U.S.C. 1135 (authorizing the Secretary of Labor to promulgate "necessary or appropriate" regulations and to define "technical and trade" terms used in Title I of ERISA). As the court correctly held, in these circumstances the appropriate standard of review for regulations interpreting an ambiguous statutory provision is " 'whether the agency's answer is based on a permissible construction of the statute' " (Pet. App. B5) (quoting from *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council,* 467 U.S. 837, 843 (1984)).

b. Petitioners contend (Pet. 24-27) that 29 C.F.R. 2510.3-1(b) is "nonsensical" because it accords different treatment to "*identical* vacation benefit[s]" based "*solely* on whether the vacation benefits under those plans or programs are financed through a trust fund or through the employer's general assets." But, as the court of appeals correctly concluded (Pet. App. B5), the term "vacation benefits" has no plain meaning, and the Department's regulation reasonably distinguishes vacation "payroll

practices" from ERISA-covered "vacation benefits" based not only on the absence of a separate fund, but also primarily on the close affinity between paid vacation leave and ordinary cash wages.

As the court below recognized, the Department's payroll practices regulation gives effect to Congress's intent not to subject to federal regulation ordinary cash wages, such as traditional vacation leave, paid from an employer's general assets. Congress sought in ERISA to regulate the wide variety of fringe benefit programs that had developed as "a means of compensating workers in lieu of increased wages" as a result of wage freezes imposed during World War II and the Korean conflict. S. Rep. 93-127, 93d Cong., 1st Sess. 3 (1973), *reprinted in* 1 *Legislative History of the Employee Retirement Income Security Act of 1974,* at 587, 589 (Comm. Print 1976) (hereinafter cited as *Leg. Hist.*). In enacting ERISA, Congress was principally concerned with evidence of mismanagement of funds accumulated to finance such benefits and with failure to pay employees promised fringe benefits.[2] As the court of appeals pointed out, however, "[t]raditional vacations during which the employer continue[s] to pay the employees'

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[2] As this Court has acknowledged, "[o]ne of Congress' central purposes in enacting this complex legislation was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 374 (1980) (footnote omitted) (quoting from a statement by Senator Bentsen, *reprinted in* 3 *Leg. Hist.* 4793). See also, 120 Cong. Rec. 4279-4280 (1974) (statement of Rep. Brademas); *id.* at 4277-4278 (statement of Rep. Perkins); 119 Cong. Rec. 30003 (1973) (statement of Sen. Williams). Evidence before Congress also reflected abuses involving misuse and mismanagement of welfare and pension benefit funds. See, *e.g., Private Welfare and Pension Plan Legislation: Hearings on H.R. 1045, H.R. 1046, and H.R. 16462 Before the General Subcomm. on Labor of the House Comm. on Education and Labor,* 91st Cong., 1st & 2d Sess. 464, 470-472 (1970) (statement of George Shultz, Secretary of Labor).

regular wages present[] neither of the evils Congress intended to address" (Pet. App. B7). Since vacation wages, like other ordinary wages, are generally paid in cash from the employer's business resources, "[t]here is no fund to administer and no special risk of loss or non-payment" (*ibid.*).

The Department's interpretation of the statute to cover funded vacation payments is also consistent with the significant historical fact of which Congress was plainly aware that collectively bargained vacation benefit funds have historically been the practice in a number of industries, most notably construction and longshoring, where employees frequently do not work for the same employer throughout the year. See, *e.g., Franchise Tax Board* v. *Construction Laborers Vacation Trust,* 463 U.S. 1, 4 & n.2 (1983). It was certainly reasonable for the Department, in construing the term "vacation benefits" in ERISA, to keep in mind Congress' likely concern with these specialized funded vacation benefit programs.

c. The distinction between traditional cash wages and specialized forms of fringe benefit compensation also refutes petitioners' reliance (Pet. 32-38) on cases holding that unfunded plans providing severance pay and group health insurance benefits are covered by ERISA. While we agree with petitioners that the existence of a separate fund in not required for ERISA coverage of employee benefit plans, see, *e.g., Donovan* v. *Dillingham,* 688 F.2d 1367, 1372-1373 (11th Cir. 1982) (en banc), it does not follow that Congress intended ERISA to regulate all forms of general asset compensation. Indeed, in rejecting arguments that severance benefits should be considered "payroll practices" when paid from general assets, the courts in *Gilbert* v. *Burlington Industries, Inc.,* 765 F.2d 320, 326 (2d Cir. 1985), and *Holland* v. *Burlington Industries, Inc.,* 772 F.2d 1140, 1146 (4th Cir. 1985), expressly concluded that severance pay is distinguishable

from the types of general asset compensation identified in the payroll practices regulation because it occurs only after termination of employment, whereas the payroll practices regulation concerns types of compensation that are normally received during the course of employment.[3] Vacation leave payments are "easily analogized to ordinary wages" that ERISA was not intended to cover (Pet. App. B10, quoting *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1503 (9th Cir. 1985)). Cf. *Abella* v. *W.A. Foote Memorial Hospital, Inc.*, 557 F. Supp. 482 (E.D. Mich. 1983), aff'd per curiam, 740 F.2d 4 (6th Cir. 1984) (accumulated paid sick leave provided during the term of employment is not the type of "benefit[] in the event of sickness" (29 U.S.C. 1002(1)) Congress intended ERISA to cover).[4] In contrast, severance pay is available only upon termination of employment and constitutes a specialized form of deferred compensation that Congress sought to regulate through ERISA.[5]

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[3] This Court has been asked to review the decisions in *Gilbert* (Nos. 85-441 and 85-460) and *Holland* (Nos. 85-929 and 85-944), and the Court has invited the views of the United States in *Gilbert*. As discussed in the government's submission supporting summary affirmance in that case, every court of appeals that has considered the question has concluded that an employer's unfunded severance pay policy is an employee welfare benefit plan covered by ERISA and the Department of Labor has consistently interpreted the definition of "welfare plan" to include such unfunded plans.

[4] Of course this analysis applies equally to holiday leave and to the other types of paid leave arrangements included in the "payroll practices" regulation. Petitioners are flatly wrong in their repeated assertions (Pet. 35, 36 & n.11) that the regulation illogically accords different treatment to holiday and vacation leave arrangements. In a single clause, the regulation identifies payroll practices consisting of "[p]ayment of compensation while an employee is on vacation *or absent on a holiday*" (29 C.F.R. 2510.3-1(b)(3)(i) (emphasis added)).

[5] The fact that the vacation wages at issue in this case were payable upon termination of employment does not matter. The distinction the Department made was between severance pay, which is always payable after termination of employment, and compensation, such as

Moreover, the court of appeals found that "[n]ot only would inclusion of routine vacations-with-pay within ERISA contribute nothing to solution of the problems Congress sought to solve, it would also impose a substantial and needless burden upon employers and the federal courts" (Pet. App. B11). As the court explained, employers would be required to formulate plans, establish procedures, give notices to employees, and file reports with the Department. See 29 U.S.C. 1022, 1024(a)(1) and (2)(A), 1024(b), 1026(a), 1133(1) and (2). And "[a]ny employee claiming denial of vacation leave could sue his employer in federal court" (Pet. App. B12). See 29 U.S.C. 1132(a). As the court below aptly concluded, "[i]t is unlikely Congress intended to create burdens of this magnitude without evidence of need, and without comment" (Pet. App. B12).

d. Petitioners argue against the distinction drawn by the regulation on the ground (Pet. 27-28) that it would permit an employer to avoid more "onerous" state laws simply by establishing a trust "overnight," funding it "with *one dollar,*" and "funnel[ing] all vacation benefit payments from its general assets through an otherwise hollow vacation benefit trust fund." This argument overlooks the safeguards that ERISA establishes for funded plans and, accordingly, the disincentive for engaging in such a scheme. While there is no requirement ab initio to set aside assets or otherwise fund a welfare benefit plan (see 29 U.S.C. 1081(a)(1)) once an employer undertakes to separately fund a plan, Section 403(a) of ERISA requires, with certain exceptions not applicable here, that "all assets of an employee benefit plan shall be held in trust by one or more [named] trustees" (29 U.S.C. 1103(a)). Thus, with

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wages, that usually is payable during the course of employment. While vacation payments are sometimes payable at the time employment is terminated, wages are sometimes payable then too, so vacation payments are not distinguishable from ordinary wages in that respect.

respect to any funded welfare benefit plan, there will be an independent trustee who is responsible, inter alia, for assuring that trust funds are collected and that participants and beneficiaries receive the benefits to which they are entitled. See 29 U.S.C. 1103(c)(1), 1104(a)(1) (imposing standards of trustee and other fiduciary conduct). Because welfare funds, like pension funds, must be held by independent fiduciaries operating under strict fiduciary duties, it is not true, as petitioners suggest, that the transfer of funds to an ERISA trust would contribute nothing to the protection of participants and beneficiaries of welfare benefit plans.[6]

Nor is there any merit to petitioners' related argument (Pet. 28) that Congress did not intend to permit employers in effect to choose ERISA coverage based on their choices

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[6] Petitioners mistakenly rely (Pet. 26) on Internal Revenue Service Private Letter Ruling 8335087 (June 1, 1983) for the proposition that an employer can establish a "hollow" vacation benefit trust under ERISA. This issuance, however, is limited to the tax consequences of particular circumstances involving a holiday and vacation benefit trust; it does not address the application or requirements of ERISA, and in any event "may not be used or cited as precedent." 26 U.S.C. 6110(j)(3). Moreover, the letter does not in any way sanction an empty trust as postulated by petitioners. It discusses an arrangement whereby a vacation and holiday benefit trust fund is deemed to be the statutory employer for purposes of income tax withholding under 26 U.S.C. 3401(d)(1), even though the common law employer responsible for funding the trust may also be authorized to act as an agent of the trust for tax withholding purposes in accordance with Rev. Proc. 70-6, 1970-1 C.B. 420. Under the described arrangement, the company agent would handle benefit payments and tax withholding through payroll administration, subject to periodic reimbursement from the trust, thereby reducing overall administrative costs. Even for tax purposes, however, the letter points out that such an arrangement is possible only where "[t]he Company irrevocably obligates itself to provide certain funds to the trust" and "the trust, not the Company, has legal control and responsibility over the funds." As we have shown, ERISA imposes strict fiduciary duties on trustees in these circumstances.

concerning the structure of the wage and benefit package offered to their employees. In ERISA, Congress neither mandated nor prohibited any particular type of benefits. The statute establishes requirements and sets minimum standards for existing plans, but leaves to employers the discretion to determine what benefits to offer. It is true that an employer who creates a trust to pay vacation benefits and separately funds it in advance thereby establishes a plan governed by the federal statute, whereas an employer who merely continues to make ordinary wage payments from general assets while employees are on vacation remains subject to state law. But, whether those structures are devised to avoid one or the other of the statutory schemes or, as is more likely, to respond to other business concerns, the employer's motives are irrelevant to the determination of ERISA coverage. Rather, coverage under the statute is determined from the objective facts concerning the plan.

e. Finally, petitioners argue (Pet. 45-51) that Congress intended to occupy the field of employee benefit plan regulation and thereby sought to protect multi-state employers from the burden of conflicting state regulation in this area. But, as the court of appeals incisively concluded, "federal exclusivity is a corollary of regulatory coverage, not an independent statutory goal, and the Secretary has reasonably concluded that Congress did not intend to regulate unfunded vacations-with-pay" (Pet. App. B15). See also *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 n.17 (1983) (state laws are preempted "only insofar as they relate to plans covered by ERISA"); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 nn.19, 20 (1981) ("ERISA's pre-emption clause exempts state laws relating to * * * plans that do not fall within the Act's coverage"). In short, the policies underlying ERISA's preemption provision "do not throw light on what matters Congress intended to cover by ERISA in the first place" (Pet. App. B15-B16).

2. a. Petitioners argue (Pet. 29-31) that the court of appeals' decision is inconsistent with the implicit holdings of this Court in *Massachusetts Mutual Life Insurance Co.* v. *Russell,* No. 84-9 (June 27, 1985), and *Shaw* v. *Delta Air Lines, Inc., supra,* that disability benefits funded from employers' general assets are governed by ERISA.[7] Coverage of the plans, however, was not an issue in *Russell* or *Shaw.* Accordingly, this Court had no occasion to consider the applicability of the payroll practices regulation or otherwise to discuss the legal principles that apply to questions of ERISA coverage. Nor does it appear that the facts in those cases were developed sufficiently to permit meaningful consideration of the question.[8] Indeed, the Court in *Shaw* limited its decision in a manner consistent with the payroll practices regulation, noting that since

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[7] The payroll practices regulation excludes the payment of short-term salary continuation payments on account of disability from coverage under ERISA by providing that "welfare plan" does not include "[p]ayment of an employee's normal compensation, out of the employer's general assets, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties" (29 C.F.R. 2510.3-1(b)(2)).

[8] In *Shaw,* the plaintiff employers alleged only in general terms that they maintained various types of employee benefit plans which were "funded and administered in several different ways." See *Delta Air Lines, Inc.* v. *Kramarsky,* 650 F.2d 1287, 1307, modified, 666 F.2d 21 (2d Cir. 1981), aff'd in part and rev'd in part *sub nom. Shaw* v. *Delta Air Lines, Inc.,* 463 U.S. 85 (1983). The plaintiff in *Russell* sought benefits under both a short-term salary continuation program and a long-term disability benefits plan. Her employer initially granted benefits for a period of five months, then terminated benefits for 132 days, and finally reinstated her benefits retroactively (slip op. 1-2). Contrary to petitioners' contentions (Pet. 30 & n.6), however, it is not clear that her claims involved only short-term salary continuation, a type of general asset compensation that would be excluded from ERISA coverage under the payroll practices regulation (see note 7, *supra*). The decisions in *Russell* simply do not reflect what type of benefits were provided by the employer's disability plan.

ERISA preempts state laws only to the extent that they relate to covered plans, the state law at issue "would be unaffected insofar as it [regulates] * * * hiring, promotion, *salary,* and the like" (463 U.S. at 97 n.17 (emphasis added)).

b. Petitioners also contend (Pet. 31-32) that the court of appeals' decision is in "direct conflict" with the decision of the Sixth Circuit in *Blakeman* v. *Mead Containers,* 779 F.2d 1146 (1985). In *Blakeman,* the Sixth Circuit concluded without discussion that the severance and vacation pay plans at issue were covered by ERISA and accordingly held that the participants' state common law contract claims for benefits under those plans were preempted by the federal statute. The *Blakeman* decision, however, does not reflect whether the vacation benefit plan at issue was separately funded. Nor did the Sixth Circuit cite, let alone discuss the applicability of, the payroll practices regulation. Petitioners assert a conflict based upon an unexplained "but see" citation to the court of appeals' decision contained in a footnote to the *Blakeman* opinion. See 779 F.2d at 1149 n.2. Given the Sixth Circuit's approval of the payroll practice regulation in *Abella,* 740 F.2d at 5, and in the absence of any discussion or analysis of the coverage issue, the court's decision cannot be viewed as necessarily in conflict with the decision below.

c. Petitioners further argue (Pet. 38-41) that review is warranted because the decision below conflicts with the decision of the Massachusetts Supreme Court in *Barry* v. *Dymo Graphic Systems, Inc.,* 394 Mass. 830, 478 N.E.2d 707 (1985). In *Barry* the court followed the ruling of the district court in this case and held that an unfunded vacation pay arrangement is a welfare benefit plan under ERISA. The court rejected the opposite conclusion because of its misconception that to do so "would cause the incongruous result of allowing an employer to avoid the broad scope of ERISA coverage by adopting a plan which ignores the fiduciary responsibilities required under

ERISA." 478 N.E.2d at 713. But, as the very case it relied upon, *Dillingham,* 688 F.2d at 1372, makes clear, compliance or noncompliance with ERISA's fiduciary obligations "are not prerequisites to coverage under the Act." Moreover, the *Barry* court focused exclusively on the funded/unfunded distinction and did not direct itself to the wage/benefit distinction asserted in the regulation and found critical by the Ninth Circuit in overruling the district court in the instant case. Given these considerations, and the fact that the *Barry* court did not have the benefit of the Ninth Circuit's well-reasoned decision, we do not believe that the conflict between *Barry* and the instant case warrants further review.[9]

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[9] The decision here is also in accord with the decisions of other courts that have agreed with the Department that routine paid vacations (and other common forms of paid leave) are properly excluded from coverage by the regulation. See *Abella,* 740 F.2d at 5; *National Metalcrafters* v. *McNeil,* 602 F. Supp. 232, 236-237 (N.D. Ill. 1985), aff'd on other grounds, 784 F.2d 817 (7th Cir. 1986); *Richardson* v. *St. Mary Hospital,* 6 Kan. App.2d 238, 627 P.2d 1143 (1981); but see *James* v. *T.G. & Y. Stores Co.,* No. 85-0113 (W.D. La. May 13, 1985) (Pet. App. H1-H8); *Holland* v. *National Steel Corp.,* No. 83-0033-W(M) (N.D. W.Va. June 10, 1985) (Pet. App. I1-I10).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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